DOCKET

No. 07-1315

Title: Michael A. Knowles, Warden, Petitioner
v.
Alexandre Mirzayance

Docketed: April 18, 2008
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-57102)
Decision Date: November 8, 2007
Rehearing Denied: January 17, 2008
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 16 2008	Petition for a writ of certiorari filed. (Response due May 19, 2008)
May 15 2008	Brief of respondent Alexandre Mirzayance in opposition filed.
May 27 2008	DISTRIBUTED for Conference of June 12, 2008.
May 29 2008	Reply of petitioner Michael A. Knowles, Warden filed. (Distributed)
Jun 16 2008	DISTRIBUTED for Conference of June 19, 2008.
Jun 23 2008	DISTRIBUTED for Conference of June 26, 2008.
Jun 27 2008	Petition GRANTED.
Aug 1 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including September 2, 2008.
Aug 7 2008	Motion to dispense with printing the joint appendix filed by petitioner Michael A. Knowles, Warden.
Sep 2 2008	Brief of petitioner Michael A. Knowles, Warden filed.
Oct 2 2008	Brief of respondent Alexandre Mirzayance filed.
Oct 6 2008	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Oct 9 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Nov 3 2008	Reply of petitioner Michael A. Knowles, Warden filed. (Distributed).
Nov 4 2008	CIRCULATED.
Nov 7 2008	SET FOR ARGUMENT ON Tuesday January 13, 2009.
Nov 10 2008	Joint proposal to lodge copies of select record material under seal in related cases before the Claims Tribunal.
Dec 24 2008	Record received from the U.S.C.A. for the 9th Circuit.
Jan 12 2009	Record received from the U.S.D.C. for the Central District of California. (2 boxes)
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PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

No. 08-

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IN THE

Supreme Court of the United States

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner*,

v.

ALEXANDRE MIRZAYANCE, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

Concluding that defense counsel was ineffective in advising petitioner to withdraw his not-guilty-by-reason-of-insanity plea, the Ninth Circuit Court of Appeals granted habeas relief to petitioner without analyzing the state-court adjudication deferentially under "clearly established" law as required by 28 U.S.C. § 2254(d) and by supplanting the district court's factual findings and credibility determinations with its own, opposite factual findings. This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of *Carey* v. *Musladin*, 127 S. Ct. 649 (2006). On remand, the Ninth Circuit conceded that "no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense" but nonetheless concluded that its original decision was "unaffected" by *Musladin* and subsequent § 2254(d) decisions of this Court.

The questions presented are:

1. Did the Ninth Circuit again exceed its authority under § 2254(d) by granting habeas relief without considering whether the state-court adjudication of the claim was "unreasonable" under "clearly established Federal law" based on its previous conclusion that trial counsel was required to proceed with an affirmative insanity defense because it was the only defense available and despite the absence of a Supreme Court decision addressing the point?

2. May a federal appellate court substitute its own factual findings and credibility determinations for those of a district court without determining whether the district court's findings were "clearly erroneous?"

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IN THE

Supreme Court of the United States

No. 08-

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner,*

v.

ALEXANDRE MIRZAYANCE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Michael A. Knowles, Warden, California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The post-remand opinion of the Ninth Circuit is unpublished. The original opinion of the Ninth Circuit and the previous opinions of the district court are unpublished. The opinion of the California Court of Appeal, and the California Supreme Court's summary denial of habeas corpus relief, are unpublished. Each is reproduced in the Appendix to this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2. Section 2254 of Title 28 of the United States Code provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

JURISDICTION

The post-remand opinion of the court of appeals was filed on November 6, 2007. The court of appeals' denial of the Warden's petition for rehearing and suggestion for rehearing en banc was filed on January 17, 2008. Pet. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This case comes to this Court for the second time. See *Knowles* v. *Mirzayance*, 127 S. Ct. 1247 (2007). Following the Ninth Circuit's original divided opinion granting habeas relief, this Court granted the Warden's petition for certiorari, vacated the panel decision, and remanded the case for further consideration in light of *Carey* v. *Musladin*, 127 S. Ct. 649 (2006).

This Court in *Musladin* reaffirmed and clarified the

limited role and authority of federal courts under § 2254(d), reversing the Ninth Circuit's grant of habeas relief in that case because "[n]o holding of this Court" compelled the California Court of Appeal to grant relief on the state prisoner's claim of spectator misconduct. *Id.* at 654. In *Schriro* v. *Landrigan*, 127 S. Ct. 1933 (2007), and *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam), this Court cast further light on the "clearly established law" principle set forth in § 2254(d) as articulated in *Musladin*, and applied the principle to ineffective-counsel claims. In each of these cases, this Court reversed the circuit court's grant of habeas relief because no decision of this Court had addressed the type of attorney conduct that the prisoner had challenged in state court.

Nonetheless, on remand, a divided Ninth Circuit panel concluded that its original decision was "unaffected" by *Musladin* and the subsequent § 2254(d) decisions of this Court. Instead, it again ordered a writ of habeas corpus to issue for Mirzayance's ineffective-counsel claim, even while acknowledging that "no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense," i.e., the basis of Mirzayance's claim that was raised and rejected in the state courts. The panel majority reinstated its original decision resolving Mirzayance's claims in his favor, based on its de novo review of the federal evidentiary hearing record, and without any analysis of whether the state courts' adjudication had been unreasonable under clearly established law.

The Ninth Circuit's reinstated decision failed to adhere to this Court's remand order and ran afoul of the strict limitations on habeas corpus relief imposed by § 2254(d), especially in light of *Musladin*, *Landrigan*,

and *Van Patten*. As *Van Patten* made clear, a federal habeas court cannot avoid *Musladin* simply by declaring, as the Ninth Circuit did here, that the general ineffectiveness doctrine of *Strickland* v. *Washington* is "clearly established" law. Rather, under § 2254(d), unless a holding of this Court "squarely addresses" the type of attorney conduct challenged, or gives a "clear answer" to the question presented, "it cannot be said that the state court unreasonably applied clearly established Federal law." *Van Patten*, at 747.

Neither *Strickland* nor any other decision of this Court has held that an attorney must always advance an affirmative defense such as insanity if it is "the only defense available" and "might" succeed, as the majority panel declared in this case. Pet. App. at 8. On the contrary, "[b]ecause [this Court's] cases give no clear answer to the question presented, let alone one in [the state prisoner's] favor, 'it cannot be said that the state court unreasonably applied clearly established Federal law.'" *Van Patten*, at 747 (quoting *Musladin*, 127 S. Ct. at 654). Like the Seventh Circuit in *Van Patten*, the Ninth Circuit has misapprehended the import of a remand order to reconsider a grant of habeas relief in light of *Musladin*, and has again exceeded its limited authority under § 2254(d). Thus, as in *Van Patten*, this Court's intercession is again required.

STATEMENT OF THE CASE

1. *The Crime*

Mirzayance fatally stabbed and shot his nineteen-year-old cousin, Melanie Ookhtens, in her family's home. Immediately after the homicide, Mirzayance gathered the knife and the spent shell casings, showered, disposed of his bloody clothes, and left a false alibi message on Ookhtens's answering machine. Hours

later, at the urging of a friend, Mirzayance turned himself in to police. He explained that he killed Melanie because she had "pissed him off" and because he had smoked marijuana. However, a urine sample taken from Mirzayance four hours after the murder tested negative for marijuana.

2. *State Court Proceedings*

Mirzayance was charged with first-degree murder. He entered pleas of not guilty and not guilty by reason of insanity (NGI). Under California law, such pleas result in a bifurcated trial. In the first phase, the jury renders a verdict solely on the question of guilt. If the jury finds the defendant guilty, a second phase occurs in which the jury determines whether the defendant has proven that he was not sane at the time of the offense. Cal. Penal Code § 1026. To prevail at this second phase, the defendant must prove by a preponderance of the evidence that he was legally insane, meaning — regardless of whether he suffered from a mental disease or disability — he either failed to appreciate the nature and quality of his actions at the time he committed the crime, or failed to appreciate the wrongfulness of those actions. Cal. Penal Code § 25(b); *People* v. *Skinner*, 704 P.2d 752, 763-65 (Cal. 1985).

Mirzayance's trial counsel, Donald Wager, sought to obtain a guilt-phase verdict of only second-degree murder—a level of culpability that he conceded to the jury—and thereafter to secure an NGI verdict. The jury, however, returned a verdict of premeditated and deliberate first-degree murder. After conferring with his co-counsel, Wager advised Mirzayance to withdraw the NGI plea. Mirzayance did so and was sentenced to prison for a statutorily-mandated term of twenty-nine years to life.

In state habeas corpus proceedings, Mirzayance claimed that Wager had rendered ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984), for advising him to withdraw the NGI plea. The California Court of Appeal and the California Supreme Court summarily denied the ineffective-counsel claim on the merits but without stating its reasons. Pet. App. I & J.

3. *Federal Habeas Corpus Proceedings*

a. Mirzayance raised the same ineffective-counsel claim in a federal habeas petition. The district court denied relief, concluding that the state-court decisions were "neither contrary to or an unreasonable application of federal law. 28 U.S.C. § 2254(d)." As the district court explained:

> Given that the jury rejected Dr. Satz's [guilt-phase expert opinion] that [Mirzayance's] mental impairments deprived him of the ability to perform the more demanding tasks of deliberating and planning a murder, defense counsel reasonably predicted that this same jury would find plaintiff fully capable of discerning right from wrong and would, therefore, reject the proffered insanity defense. Defense counsel, who knew what he had to present during the insanity defense portion of the trial, made an informed decision that he did not have sufficient evidence to cause this jury to change its mind. Having concluded that there was no chance of success on the insanity defense, counsel advised his client to waive the defense and accept the sentence of the court.
>
> * * *
>
> Accordingly, on this record, counsel's strategic decision to recommend the withdrawal of the

> insanity defense, made after consultation with [Mirzayance], was not an unreasonable one, and does not constitute ineffective assistance of counsel.

Pet. App. at 153-54.

b. Mirzayance appealed. Concluding that "[t]he record presents conflicting reasons for the abandonment of the insanity defense," a Ninth Circuit panel remanded the case to the district court "with instructions to conduct an evidentiary hearing on whether counsel was deficient for recommending and concurring in the withdrawal of the insanity defense [*Strickland* prong one], and if so, whether this ineffectiveness prejudiced Mirzayance [*Strickland* prong two]." Pet. App. 106, 115-16.

c. Following a four-day evidentiary hearing, the district court resolved all factual disputes against Mirzayance. The district court found that the jury's conclusion that the murder was "willful, premeditated, and deliberate" meant the defense's strategy—to obtain a conviction of only second-degree murder—had failed. The court also found that, although Wager had planned to proceed with a sanity phase anyway, he believed that "[a]ny remaining chance of securing an NGI verdict . . . now depended (in his view) on presenting some 'emotional impact' testimony *by Petitioner's parents*, which Wager had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase." Pet. App. 42, 51. But the court determined that, just before the sanity phase was to begin, Mirzayance's parents—to Wager's surprise—made it clear that they would not testify, and that their attorney suggested to Wager that he proceed without them. The district court further found that, although Wager was angry, he concluded that the parents' refusal to testify was a "done deal," and "one that any beseeching on his

part could not undo." Pet. App. 71-76.

Wager then consulted with his co-counsel, who concurred that they should withdraw the NGI plea. Pet. App. 71. The district court found that Wager "carefully weighed his options before making his decision final," that he had "made a rational choice to forgo the insanity defense," and that his decision was "carefully considered," "not rashly made," and "appeared to be reasonable to him and his co-counsel, in light of the guilt phase verdicts and the parents' statements to him on the way to court that morning." Pet. App. 68-71.

Crediting counsel's decision as competent, the district court opined that, under the deferential standard of review required by 28 U.S.C. § 2254(d), the state courts' rejection of the claim did not result from an unreasonable application of *Strickland*. The court also stated that its opinion would be the same even under de novo review of the record as expanded in federal court. Pet. App. 97-98.

Despite its factual and legal conclusions, however, the district court ultimately granted the writ because, in its view, the Ninth Circuit's remand order had amounted to a "mandate" that "destined [Mirzayance] to relief." The court noted that the remand order had contained a parenthetical citation to the pre-AEDPA case of *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987), an ineffective-counsel case in which the Fifth Circuit had observed that it could see "no advantage" in a trial counsel's decision to bypass an insanity defense. Pet. App. 97-98. The district court inferred from the Ninth Circuit's citation that the "'nothing to lose' rule pronounced in *Profitt*" was the "law of the case." Thus, the district court explained, the function of the evidentiary hearing was simply to determine, de novo, "whether, in fact, Petitioner had nothing to lose."

Because defense counsel Wager had acknowledged there was nothing that Mirzayance "*gained* by waiving the NGI trial," the district court said it was "bound" to find that counsel had "nothing to lose," and that his performance was therefore necessarily deficient under *Proffitt*. Pet. App. 98-100 (italics added). The district court did not assess whether Wager's "deficient" performance had been prejudicial under *Strickland*. Instead, it concluded that the Ninth Circuit, per the remand order, had already decided that Wager's remaining NGI defense was "viable and strong" and that there was a reasonable probability Mirzayance "would have obtained a better trial outcome had that defense been presented." Given the perceived mandate, the district court "reluctantly" granted relief. Pet. App. 35-37, 98-100.

d. The Warden appealed and argued, inter alia, that the state courts' decision was reasonable and thus conclusive under 28 U.S.C. § 2254(d)(1). The Ninth Circuit affirmed. In an unpublished 2-to-1 opinion, the panel first asserted that the district court had erred in inferring any mandate for relief from the remand order. The majority, however, did not implement the ruling denying relief that the district court stated it would have issued absent the perceived mandate. Nor did it analyze whether the state courts' adjudication of the claim had been contrary to or an objectively unreasonable application of clearly established federal law under § 2254(d)(1). Rather, the majority affirmed the granting of the writ, "albeit on different grounds."

The panel majority replaced the district court's "key" factual findings with its own opposite findings. The panel majority found (1) that Wager had acted "rashly," and (2) that the parents had not refused to testify. Pet. App. 28. Based on these new factual findings, the

majority concluded that "'reasonably effective assistance' would put on the only defense available, especially in a case such as this where there was significant potential for success." Pet. App. 29. Although the district court had not addressed prejudice, the majority independently resolved that issue in Mirzayance's favor, concluding from the evidentiary hearing record that had a sanity phase proceeded, there was a "reasonable probability" "that the jury would have found Mirzayance insane." *Id.* The majority did not address the state courts' denial of the claim on habeas corpus, or explain how under § 2254(d) the state courts' adjudication was an unreasonable application of clearly established federal law.

The dissent contended that the majority should have deferred to the district court's well-founded "explicit factual findings," and that the majority's opinion "suggests that to avoid violating *Strickland*, an attorney must always advance any potentially non-futile, colorable, affirmative defense regardless of its questionable merit or arguable chance of success. This is not the standard established by *Strickland* and in fact suggests something more akin to the 'nothing to lose' standard set forth in *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987)." Pet. App. 31-34.

The Warden filed a petition for rehearing and suggestion for rehearing en banc, arguing that the panel majority failed to review the state courts' rulings deferentially under 28 U.S.C. § 2254(d)(1) and wrongly substituted its own factual findings for those of the district court. The court of appeals declined to rehear the case en banc. Pet. App. 23.

4. *United States Supreme Court Proceedings*

The Warden petitioned this Court for certiorari,

arguing, inter alia, that the panel majority's analysis and conclusions were wrong, and that the state courts' adjudication was conclusive because it was not "contrary to" or an "unreasonable application" of "clearly established Federal law as determined by the Supreme Court." Mirzayance filed an opposition and the Warden filed a reply. This Court distributed the case for conference seven times and ordered the records of the proceedings in the Ninth Circuit and the district court.

While the petition for certiorari was pending, this Court decided *Carey* v. *Musladin*. In *Musladin*, this Court reversed the Ninth Circuit's grant of habeas relief and held that the state appellate court determination — that a habeas petitioner was not inherently prejudiced when spectators wore buttons depicting murder victim — was not contrary to or unreasonable application of clearly established federal law as set forth in any Supreme Court holding. 127 S. Ct. at 654. Because of "the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here," and because "[n]o holding of this Court required" the states to apply the Court's test for government-sponsored courtroom practices to spectators' courtroom conduct, this Court held that the Ninth Circuit violated AEDPA when it failed to defer to the state court's rejection of Musladin's challenge to the spectators' courtroom conduct. *Id.* at 652.

Several weeks later, the Court granted the Warden's petition for certiorari, vacated the divided panel decision, and remanded the case for further consideration in light of *Musladin*. Pet. App. 22.

Shortly after this Court issued its order in this case, it decided *Schriro* v. *Landrigan*. In *Landrigan*, the Ninth Circuit had granted habeas relief to another state

prisoner, finding his trial counsel was ineffective under *Strickland* for failing to conduct further investigation into mitigating circumstances in a capital case, notwithstanding the defendant's instruction not to present such evidence. This Court reversed, emphasizing that "we have never addressed a situation like this." *Landrigan*, 127 S. Ct. at 1942. "Neither *Wiggins* [v. *Smith*, 539 U.S. 510 (2003)] nor *Strickland* [v. *Washington*, 466 U.S. 668 (1984)] addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." *Id.* "In short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence." *Id.*

5. *Post-Remand Proceedings in the Ninth Circuit*

The Ninth Circuit ordered supplemental briefing from the parties on "the possible relevance of *Musladin* as well as *Schriro* v. *Landrigan*." Pet. App. 4.

On November 6, 2007, a divided Ninth Circuit panel reinstated its original decision. The majority declared that "our decision is unaffected by *Musladin* or *Landrigan*, and we therefore again affirm the grant of habeas corpus." Pet. App. 4. Adhering to its prior decision, the majority asserted that "the fact that no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense does not carry the day. . . ." Pet. App. 12. The panel majority stated that *Strickland* was the "clearly established law," and that "[r]easonably

effective assistance" under *Strickland* "required here that counsel assert the only defense available, especially given the significant potential for success." Pet. App. 8, 12. Once again, the opinion did not analyze whether the state courts' adjudication of the claim had been contrary to or an objectively unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). The dissenting judge found that the decision did not comport with *Musladin* or AEDPA, and again protested "the majority's independent review of the record *without regard* to the lower court's factual and credibility findings made after a four-day evidentiary hearing." Pet. App. 13-21 (italics added).

The Warden filed a petition for rehearing and suggestion for rehearing en banc, arguing that the panel majority wrongly disregarded this Court's GVR order; again failed to analyze the state courts' adjudication under 28 U.S.C. § 2254(d)(1); and again wrongly substituted its own factual findings for those of the district court.

While the Warden's petition for rehearing was pending, this Court decided *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam). In *Van Patten*, as in the instant case, this Court had vacated the Seventh Circuit's grant of habeas relief and remanded for further consideration in light of *Musladin*. The court of appeals simply reissued its prior ruling granting relief under § 2254 on the claim that trial counsel's telephonic appearance at a plea hearing violated the Sixth Amendment. Following a second petition for certiorari, this Court summarily reversed. This Court reiterated the import of *Musladin*, and noted that its cases had never "squarely addresse[d]" the type of attorney conduct challenged in *Van Patten*. This Court further explained, "Our precedents do not clearly hold that

counsel's participation by speaker phone should be treated as a 'complete denial of counsel,' on par with total absence." *Id.* at 746. The Court concluded, "Because our cases give no *clear answer* to the question presented, let alone one in Van Patten's favor, 'it cannot be said that the state court unreasonably applied clearly established Federal law.' Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized." *Id.* at 747 (quoting *Musladin*, 127 S. Ct. at 654, italics added and punctuation omitted).

Because of its similarity to the instant case, the Warden notified the Ninth Circuit of the *Van Patten* decision. The court of appeals declined to rehear the case en banc. Pet. App. 1.

REASONS FOR GRANTING THE PETITION

BY REINSTATING ITS PRIOR DECISION UNCHANGED, THE NINTH CIRCUIT AGAIN EXCEEDED ITS AUTHORITY UNDER § 2254(D)(1) AND AGAIN IGNORED WELL-ESTABLISHED PRINCIPLES LIMITING ITS REVIEW OF DISTRICT COURT FACT FINDINGS

1. Certiorari should be granted again because the Ninth Circuit, declaring its prior decision to be "unaffected" by such matters, failed to account for this Court's GVR order and recent precedent reaffirming the limited role and authority of federal courts under AEPDA. The reinstated majority opinion amounts to an untenable extension of *Strickland* to encompass a novel "nothing to lose" test of attorney competence. At the least, it raises a question of exceptional importance: whether the Constitution requires that attorneys must always advance any potentially non-futile affirmative defense regardless of its questionable merit or arguable chance of success if it is the "only defense available."

2. Certiorari should also be granted because the reinstated opinion again ignored the threshold and dispositive question under 28 U.S.C. § 2254(d)(1): whether the state courts' adjudication of the merits of Mirzayance's claim was "contrary to," or an "unreasonable application of," federal law as "clearly established" by the holdings in this Court's decisions. See *Musladin*, 127 S. Ct. at 652-54; *Landrigan*, 127 S. Ct. at 1942; *Early* v. *Packer*, 537 U.S. 3, 11 (2002) (per curiam); *Woodford* v. *Visciotti*, 537 U.S. 19, 26-37 (2002) (per curiam); see, *e.g.*, *Rice* v. *Collins*, 546 U.S. 333, 342 (2006); *Brown* v. *Payton*, 544 U.S. 133, 140-46 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652, 664-66 (2004); *Middleton* v. *McNeil*, 541 U.S. 433, 436 (2004);

Yarborough v. *Gentry*, 540 U.S. 1, 5 (2003) (per curiam); *Lockyer* v. *Andrade*, 538 U.S. 63, 75-76 (2003).

3. Certiorari should be granted again, finally, because the reinstated opinion directly conflicts with fundamental principles of appellate review of factual determinations as set forth by the Federal Rules of Civil Procedure and by this Court. See Fed. R. Civ. P. 52(a); *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-74 (1985).

A. The Ninth Circuit Improperly Disregarded This Court's Remand Order and Exceeded Its Authority Under 28 U.S.C. § 2254(d)(1)

1. While the Warden's first petition for certiorari was pending, this Court decided *Carey* v. *Musladin*. Soon thereafter, this Court granted the Warden's petition in this case, vacated the original decision with costs, and remanded the case for further consideration in light of *Musladin*. Pet. App. C. This Court has explained that the "GVR" procedure is "a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." *Lawrence* v. *Chater*, 516 U.S. 163, 167-68 (1996); see also *Youngblood* v. *West Virginia*, 126 S. Ct. 2188, 2190-93 (2006) (dissenting opinions describing GVR procedure).

As this Court has stated, the issue in *Musladin* "was the significance of [this Court's] precedents in a case under § 2254." *Van Patten*, 128 S. Ct. at 745. Musladin challenged the California Court of Appeal's conclusion that the fact that the victim's family wore buttons displaying the victim's image at the defendant's trial was not inherently prejudicial. *Musladin*, 127 S. Ct. at 651-52. Reversing the Ninth Circuit's eventual grant of habeas relief, this Court noted that it had never

squarely addressed the issue presented. *Id.* at 653-54. Thus, "Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonably applied clearly established Federal law.' § 2254(d)(1)." *Id.* at 654.

Following the remand order in this case, this Court decided *Landrigan*, 127 S. Ct. 1933 (2007), another AEDPA case from the Ninth Circuit that cast further light on *Musladin*'s holding. In *Landrigan*, the Ninth Circuit granted habeas relief to a state prisoner by finding that his trial counsel was ineffective under *Strickland* for failing to conduct further investigation into mitigating circumstances in a capital case, notwithstanding the defendant's instruction not to present such evidence. This Court reversed, emphasizing that under AEDPA, state courts have great leeway in deciding ineffective-counsel claims absent Supreme Court holdings that address specific types of attorney conduct. *Id.* at 1942. As the Court succinctly stated, "Indeed, we have never addressed a situation like this." *Id.* Thus, the Court held the state court's postconviction decision was not objectively unreasonable under § 2254(d). *Id.*

The Ninth Circuit's reissued majority opinion in this case did not abide by this Court's GVR decision and failed to heed the import of *Musladin* or *Landrigan*. The panel majority dedicated just a single sentence to the actual relevance of *Musladin*, in which it deemed the case to be inapplicable. Pet. App. 10-11. By brushing aside the intervening authority of *Musladin* and its progeny as having "no effect" on its decision to issue a writ of habeas corpus, the Ninth Circuit gave short shrift to this Court's remand order. See *Lawrence*, 516 U.S. at 167 (describing the use of a GVR order as

appropriate where intervening development reveals a "reasonable probability that the decision below rests upon a premise that the lower courts would reject if given the opportunity for further consideration . . . ."); see, *e.g.*, *Van Patten*, 128 S. Ct. at 745 (reversing the Seventh Circuit for failing to heed the import of a GVR order citing *Musladin*, in which the "[t]he issue was the significance of [this Court's] precedents in a case under § 2254."); *Ayers* v. *Belmontes*, 127 S. Ct. 469, 472, 475 (2006) (reversing the Ninth Circuit after it "failed to heed the full import" of the holding in the case cited in a GVR order); *Sumner* v. *Mata*, 455 U.S. 591, 596-97 (1982) (issuing a second GVR order upon finding that the Ninth Circuit "misunderstood the terms of our remand" and failed to "comply with the requirements of § 2254(d)").

In this case, application of *Musladin*, *Landrigan*, and *Van Patten* would have precluded the Ninth Circuit's new extension of the law deeming counsel ineffective for failing to advance such an affirmative defense on the ground that it "might" succeed or is the "only defense available," as the panel majority found in this case. By announcing that the absence of applicable Supreme Court holdings "does not carry the day" in constraining a federal court's review of a state adjudication, and by granting habeas relief based on its new and unique test of attorney competence, the Ninth Circuit failed to adhere to the GVR and misconstrued AEDPA.

2. Besides erring in extending the *Strickland* rule at all, the panel decision extended it in untenable ways. The opinion is, in its practical effect, an application of the "nothing to lose" standard contemplated by the Fifth Circuit in the pre-AEDPA *Profitt* case. Indeed, this was the standard that Mirzayance explicitly advanced, that the Ninth Circuit cited in its remand

order for an evidentiary hearing, that the district court understandably applied as the perceived "law of the case," and that the dissent recognized was being applied by the panel majority.

The court of appeals' interpretation of *Strickland* would require that attorneys always advance any potentially meritorious affirmative defense. But since even the Ninth Circuit concedes that neither *Strickland* nor any other *holding* of this Court binds the *states* to apply such a test, AEDPA bars relief. *Musladin*, 127 S. Ct. at 651-52. Additionally, the application of such a rule to grant habeas relief in this AEDPA case violates the anti-retroactivity provisions of *Teague* v. *Lane*, 489 U.S. 288, 299-300 (1989).

Moreover, the Ninth Circuit's extension of the law is inconsistent with *Strickland* and unworkable. An attorney's decision may be informed and reasonable, and therefore not deficient, even where there may be "nothing to lose" (or gain) by choosing differently. Advancing an affirmative defense, let alone a state-created affirmative defense such as NGI, on the ground that it "might" succeed or is the "only defense available," is not a Sixth Amendment requirement, even as interpreted previously by the Ninth Circuit. See, e.g., *Lowry* v. *Lewis*, 21 F.3d 344, 346 (9th Cir. 1993) (noting habeas claim of deficient performance cannot succeed when based on the previously-rejected proposition that "'a defendant has "everything to gain and nothing to lose" in filing a motion to suppress'"). A "nothing to lose" exception is unworkable under *Strickland* because it imposes an impermissible bright-line rule that whenever a lawyer can obtain expert opinions finding insanity, he must *always* go forward with an insanity phase, regardless of his professional judgment as to its appropriateness or likelihood of success.

Further, the Ninth Circuit's extension of *Strickland* to encompass a "nothing to lose" rule directly conflicts with the standard employed in the Seventh Circuit, which has held:

> We refuse to hold that [counsel's] prudent, good-faith decision to forego an insanity defense (after investigation) constitutes ineffective assistance of counsel. Implicit in such a holding would be the notion that in order to represent a criminal defendant competently, an attorney must not only pursue each and every possible psychiatric defense, but perhaps also search out and present questionable "expert" testimony in support of such arguments. A holding of this kind would defy common sense and contradict well-established case law . . . .

Jones v. *Page*, 76 F.3d 831, 843 (7th Cir. 1996).

In sum, as the district court and the dissenting judge correctly observed, neither *Strickland* nor any other holding of this Court has required attorneys to advance all nonfrivolous claims, motions, defenses, arguments, etc., all of which might theoretically succeed and thus benefit their clients. Pet. App. 14, 32-33; see, *e.g.*, *Jones* v. *Barnes*, 463 U.S. 745, 751-54 (1983) (appellate counsel has no constitutional duty to raise every nonfrivolous issue requested by a defendant); *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985) (same). Even when there *is* a bona fide defense, "counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." *United States* v. *Cronic*, 466 U.S. 648, 656, n.19 (1984); *cf. Landrigan*, 127 S. Ct. at 1942.

B. The Ninth Circuit Improperly Failed to Review the State Court Adjudication for Simple Reasonableness Under 28 U.S.C. § 2254(d)

1. In California, a petitioner seeking habeas corpus relief must make specific factual allegations that state a claim upon which relief can be granted. *In re Swain*, 209 P.2d 793, 796 (Cal. 1949); see *In re Robbins*, 959 P.2d 311, 341 n.1 (Cal. 1998) (Mosk, J., conc.). The state court reviews the factual allegations and, if a prima facie claim has been made, an order to show cause is issued. *In re Sassounian*, 887 P.2d 527, 534 (Cal. 1995); *People* v. *Romero*, 883 P.2d 388, 390-93 (Cal. 1994). Here, the California Court of Appeal and the California Supreme Court summarily resolved Mirzayance's ineffective-assistance claim on the merits, but without a statement of reasons. Pet. App. I & J. As the California Supreme Court has repeatedly explained, a summary rejection of a habeas corpus claim without a statement of reasons is based on the assumption that the facts alleged in support of the claim are true but nevertheless do not make out a prima facie case of a valid constitutional claim. *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993); *In re Lawler*, 588 P.2d 1257, 1259 (Cal. 1979).

The California Supreme Court's decision rejecting Mirzayance's claim, therefore, was an adjudication on the merits. The Ninth Circuit has recognized that this is California's procedure. See *Griffey* v. *Lindsey*, 345 F.3d 1058, 1066, *vacated as moot*, 349 F.3d 1157 (9th Cir. 2003); *Visciotti* v. *Woodford*, 288 F.3d 1097, 1104-05 (9th Cir.), *rev'd on other grounds*, 537 U.S. 19 (2002); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc), *cert. denied*, 420 U.S. 973 (1975)

(holding that a California Supreme Court's "postcard denial without opinion is . . . a decision on the merits of the petition"); *accord Bennett* v. *Mueller*, 364 F. Supp. 2d 1160, 1173 (C.D. Cal. 2005).

2. Federal habeas corpus relief therefore is precluded in this case unless the state courts' ruling—that Mirzayance's claim was meritless even if his factual allegations were assumed to be true—was "contrary to" this Court's precedents, or an objectively "unreasonable application" of them, under § 2254(d). The district court twice showed this § 2254 deference, correctly explaining in two decisions that Mirzayance's claim failed as a matter of law under AEDPA.[1/] Pet. App. 97-98, 152-56. But the Ninth Circuit, without analyzing the state courts' adjudication pursuant to § 2254(d), granted relief by reviewing Mirzayance's claim de novo on the basis of an improper extension of this Court's *Strickland* rule and the federal evidentiary hearing record. Certainly, the panel never explained how the state courts' denial of relief was "objectively unreasonable" under *Strickland*. Instead, as in *Rice* v. *Collins*, the Ninth Circuit substituted its evaluation of the federal evidentiary hearing record for the state court's evaluation of the state court's record. *Rice*, 546 U.S. at 342.

3. Application of AEDPA's deference standard would have led to a ruling that the state courts' adjudication was conclusive because it was not "contrary to" or an "unreasonable application" of "clearly established Federal law as determined by the Supreme Court." 28

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1. The district court, however, "reluctantly" granted relief because of a mistaken belief that the Ninth Circuit's remand order was a "mandate" that "destined [Mirzayance] to relief," and gave it "no alternative other than to grant the Petition." Pet. App. 35-37, 98-100.

U.S.C. § 2254(d)(1). Under *Strickland*, to prevail on an ineffective assistance of counsel claim, a habeas petitioner must show both that, considering all the circumstances, his counsel's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687. On the "performance" prong of the ineffective-counsel test, however, the Ninth Circuit failed to accord counsel's tactical decision the requisite "double deference" under AEDPA and *Strickland*. *Yarborough* v. *Gentry*, 540 U.S. at 4. It did the opposite. Instead, as explained above, the panel majority improperly applied a completely different standard—one inquiring whether counsel had "nothing to lose"—in place of the "clearly established" *Strickland* standard.

In any event, federal habeas corpus relief is unavailable under § 2254(d)(1) because the record before the state courts reasonably supports the conclusion that counsel's challenged decision was not "prejudicial" under the second prong of the *Strickland* standard. *Strickland* places the burden on the petitioner to establish a "reasonable probability" of prejudice. *Strickland*, 466 U.S. at 694. In the context of Mirzayance's challenge to the withdrawal of an NGI plea, that appears to mean demonstrating a reasonable probability that the jury otherwise would have found him not guilty by reason of insanity. See, *e.g.*, *United States* v. *Cox*, 826 F.2d 1518, 1525-26 (6th Cir. 1987); *Profitt*, 831 F.2d at 1250-51; *Weekley* v. *Jones*, 76 F.3d 1459, 1462 (8th Cir. 1996); *Weeks* v. *Jones*, 26 F.3d 1030, 1038 (11th Cir. 1994).

To prevail on an insanity claim under California law, the defendant must prove by a preponderance of the evidence that he was legally insane, meaning that—regardless of whether he suffered from a mental

disease or disability—he either could not appreciate the nature and quality of his actions at the time he committed the crime or could not appreciate the wrongfulness of those actions. Cal. Penal Code § 25(b); *Skinner*, 704 P.2d at 763-65. Here, only the latter question was at issue, for no one has opined that Mirzayance failed to appreciate the nature and quality of his actions.

Even if Mirzayance's parents and experts would have testified as alleged in his state habeas petitions, it would not be "objectively unreasonable" under *Strickland* to conclude that Mirzayance had failed to establish a "reasonable probability" that the jury would have found he could not appreciate the wrongfulness of his actions. Although the defense experts were prepared to opine that he did not know killing Melanie Ookhtens was wrong because he was acting on the paranoid delusion that he needed to defend himself, their testimony met the serious obstacle of Mirzayance's obvious consciousness of guilt. In Mirzayance's own statements to the state's court-appointed psychiatrist, he admitted feeling that his shooting and stabbing Melanie was wrong at the time of the offense. Mirzayance's pre- and post-murder actions, which were obviously goal-oriented rather than irrational, also clearly showed he knew the murder was wrong. Those actions included: parking his car some distance from the Ookhtens's house on the night of the murder; waiting until he was alone with Melanie in the house before he closed the curtains and commenced his attack; collecting the knife and spent shell casings immediately after the murder; showering, disposing of his bloody clothes in a trash can, and concocting a false alibi on her telephone answering machine.

To the extent that defense experts would testify that

Mirzayance thought he needed to defend himself, there is no evidence that Mirzayance held such a belief. Indeed, there has never been a suggestion that Mirzayance would testify to that effect, and there is no evidence that he actually made such a claim to the defense expert doctors. While the experts all described Mirzayance's claims to having experienced visual and auditory hallucinations, *none* opined that he was hallucinating at the time he attacked Melanie. And Mirzayance told police just hours after the murder that he killed Melanie because she had "pissed him off," not because he had to defend himself for any reason, real or imagined. Thus, the mere *speculation* by additional defense experts — that Mirzayance acted because of a paranoid delusion that he needed to defend himself — would have scant evidentiary weight, assuming such testimony would be admissible at all.

Last, such expert opinions also could not be reasonably reconciled with the jury's own determination that Mirzayance was guilty of premeditated and deliberate murder. The jury had previously rejected Dr. Satz's extensive guilt phase mental-health testimony that Mirzayance's mental impairments prevented him from the more demanding tasks of deliberating and planning a murder. Pet. App. 153-54. And, as the district court painstaking detailed following the evidentiary hearing, the additional experts were subject to significant impeachment. Pet. App. 70-71. Accordingly, even if Wager's decision to forgo an affirmative NGI defense amounted to deficient performance, the state courts were not wrong—let alone "objectively unreasonable"—in rejecting Mirzayance's *Strickland* claim.

It is not "objectively unreasonable" to conclude that Mirzayance failed to show *Strickland* prejudice. Indeed,

some *fourteen* state and federal judges have disagreed with the panel majority's view. See, *e.g.*, *Van Patten*, 128 S. Ct. at 747. The Ninth Circuit failed to abide by AEDPA's strict limits on habeas review.

C. The Ninth Circuit Improperly Substituted Its Own Factual Findings for Those of the District Court

Certiorari also should be granted to correct the Ninth Circuit's departure from the rules governing appellate review of district-court factfinding. As the dissent correctly stated in the panel's original divided opinion, "the district court found that the trial counsel had made a rational, carefully considered, and informed decision to forgo the insanity defense." Pet. App. 32. The district court also found that the parents' actions amounted to "an express refusal to testify." *Id.*

But, without even discussing whether the district court's findings were clearly erroneous, the panel majority concluded: "We disagree that counsel's decision was carefully weighed and not made rashly." Pet. App. 7. And, as for the parents' refusal to testify, the majority inexplicably stated that "the district court's finding that the parents *did not refuse*, but merely expressed reluctance to testify is correct." *Id.* (italics added). By making its own factual findings, and then granting habeas relief because of those findings, the Ninth Circuit failed to heed both AEDPA and established principles of appellate review as set forth by the Federal Rules of Civil procedure and by this Court. The dissenting judge rightly faulted the majority for granting relief based on its independent findings, made "*without regard* to the lower court's factual and credibility findings made after a four-day evidentiary hearing." Pet. App. 13-14 (italics added).

A federal appellate court must assess a district court's factual findings under the "clearly erroneous" standard of review. Fed. R. Civ. P. 52(a); *Anderson*, 470 U.S. at 573. As long as the trier of fact's account of the evidence "is *plausible* in light of the record viewed in its entirety," a circuit court of appeals may not reverse it "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74 (italics added). Moreover, "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). As this Court recently stressed, "[a] panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Rice*, 546 U.S. at 342.

Here, the district court's factual findings, which clearly support the correctness and the reasonableness of the state-court decision, are well-supported by the record, and the panel majority did not suggest otherwise. Indeed, in support of its conclusion that counsel's decision was rational, carefully considered, informed, and not rashly made, the district court explained: (1) that Wager had hired multiple mental health experts to testify at the sanity phase that Mirzayance had committed the killing without premeditation or deliberation; (2) that Wager had recognized his expert testimony had "significant weaknesses," and he "convincingly detailed ways in which [the experts] could have been impeached[] for overlooking or minimizing facts which showcased [Mirzayance's] clearly goal-directed behavior"; (3) that the experts were subject to other impeachment, including evidence that one of the experts had altered

his notes in a highly-publicized criminal case; (4) that Wager's strategy at the sanity phase had been to appeal to the jurors' emotions, which required "the heartfelt participation of [Mirzayance's] parents as witnesses"; (5) that Mirzayance's parents refused to testify, which made Wager's sanity-phase strategy "impossible to attempt"; and (6) that, prior to making his recommendation, Wager conferred with his "experienced co-counsel, Lawrence Boyle," who concurred in Wager's proposal. Pet. App. 69-71.

As for the district court's second "key" finding—that the parents refused to testify—the district court dedicated an entire section of evidentiary analysis to the issue. Over the course of five pages, the district court detailed the extensive live testimony and record evidence upon which the court made its credibility determinations. Pet. App. 71-76.

Thus, it was improper for the panel majority to twice set aside the district court's factual findings and to conclude instead that Wager's decision was "made rashly" and was not carefully weighed. It was equally improper for the panel majority to disregard the finding that the parents conduct amounted to a "an express refusal to testify" and to instead opine that Wager "did not know with any certainty that Mirzayance's parents would not testify . . . ." In making its own contrary findings, the Ninth Circuit ignored the settled rule that "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Anderson*, 470 U.S. at 573-74; *Zenith*, 395 U.S. at 123.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April 15, 2008

Respectfully submitted,

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APPENDIX A

FILED
JAN 17 2008
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDRE MIRZAYANCE, Petitioner - Appellee, v. MICHAEL A. KNOWLES, Warden, Respondent - Appellant.	No. 04-57102 D.C. No. CV-00-01388-DT Central District of California, Los Angeles ORDER

Before: HUG and WARDLAW, Circuit Judges, and SUKO,* District Judge.

Judge Wardlaw voted to deny the Petition for Rehearing and the Petition for Rehearing En Banc. Judge Hug voted to deny the Petition for Rehearing and recommended denying the Petition for Rehearing En Banc. Judge Suko voted to grant the Petition for Rehearing and recommended granting the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are **DENIED**.

* The Honorable Lonny R. Suko, United States District Judge for the Eastern District of Washington, sitting by designation.

APPENDIX B

FILED
NOV 06 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDRE MIRZAYANCE, Petitioner - Appellee, v. MICHAEL A. KNOWLES, Warden, Respondent - Appellant.	No. 04-57102 D.C. No. CV-00-01388-DT MEMORANDUM*

On Remand from the United States Supreme Court
Before: HUG and WARDLAW, Circuit Judges, and SUKO,** District Judge.

The Warden appeals the district court's grant of Alexandre Mirzayance's petition for writ of habeas corpus based on ineffective assistance of counsel in his state trial court proceedings. In a memorandum disposition filed on April 10, 2006, we affirmed the decision of the district court.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Lonny R. Suko, United States District Judge for the Eastern District of Washington, sitting by designation.

I.

This appeal now returns to us upon remand by the United States Supreme Court in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006). We have requested and reviewed supplemental briefing by the parties discussing both the possible relevance of *Musladin*, as well as *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007). We conclude that, especially in light of *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007), our decision is unaffected by *Musladin* or *Landrigan*, and we therefore again affirm the grant of habeas corpus.

II.

We are required by the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") to give significant deference to the decision of the state court. Where, as here, the state court has provided an adjudication on the merits of the habeas claim but has not explained its underlying reasoning or held an evidentiary hearing, however, we conduct an independent review of the record to determine whether the state court's final resolution of the case was an unreasonable application of clearly established federal law. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) ("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable."); *Greene v. Lambert*, 288 F.3d

1081, 1088-89 (9th Cir. 2002) (explaining AEDPA standard of review where state court provides no reasoned explanation for its decision on petitioner's claim). We therefore independently review the state court record and the evidentiary hearing held by the district court upon remand, and conclude that the state court's denial of habeas relief to Mirzayance was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

III.

The district court and the magistrate judge misapprehended our prior remand for an evidentiary hearing on whether counsel's advice to withdraw the plea of not guilty by reason of insanity ("NGI") was a true tactical decision that constituted "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The citation to *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987), indicated only that labeling a decision "tactical" does not necessarily mean that a true tactical choice, one "between alternatives that each have the potential for both benefit and loss," was made. *Id.* at 1249. The evidentiary hearing was necessary, as the state had not conducted one, to resolve the conflicting evidence as to counsel's reason for abandoning Mirzayance's only defense—insanity.

IV.

Counsel's advice to Mirzayance to withdraw the insanity plea "fell below an objective standard of reasonableness," and therefore constitutes deficient performance. *Strickland*, 466 U.S. at 688. Counsel testified at the evidentiary hearing that he

recommended withdrawal of the NGI defense "out of a sense of hopelessness," basing his decision on two factors. Counsel explained that he did not believe a jury that had found premeditation would find insanity, and therefore the jury's first-degree murder verdict rendered success in the insanity phase almost certainly unattainable. Further, the "triggering event" that precipitated his decision was the supposed refusal of Mirzayance's parents to testify in the insanity phase.

The Warden argues that counsel's decision was "strategic," and thus not deficient performance. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable" under *Strickland*. *Id.* at 690. We conclude, however, that counsel did not make a true tactical choice. Counsel failed to consider the likelihood that the jury, after hearing the substantial evidence available to show that Mirzayance was legally insane at the time of the killing, might be persuaded that Mirzayance was in fact insane. As lay people, they might not recognize, as counsel thought they would, the seeming logical incompatibility between those two findings.[1/] Moreover, counsel's fear that the jury would

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1. As a matter of California law, insanity and premeditation are not mutually exclusive. To establish insanity under California law, the defendant must prove "that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." CAL. PENAL CODE § 25(b). Incapacity to know the nature and quality of one's act and to distinguish right from wrong is not incompatible with capacity to premeditate and deliberate, which does not necessarily require knowledge or understanding of the nature of the act premeditated or deliberated. Indeed, California law explicitly provides that premeditation and deliberation do not require a showing that "the defendant maturely and meaningfully reflected upon the gravity of

not find insanity after finding premeditation was unfounded, based on an unreasonable assumption that because the jury rejected the opinion of one mental health expert testifying on premeditation in the guilt phase, the jury would reject the testimony of four defense experts testifying during the NGI phase that Mirzayance was legally insane at the time of the murder. Further, although counsel claims that Mirzayance's parents refused to testify, the district court's finding that the parents did not refuse, but merely expressed reluctance to testify, is correct. Competent counsel would have attempted to persuade them to testify, which counsel here admits he did not.

We disagree that counsel's decision was carefully weighed and not made rashly. Counsel himself admitted in the evidentiary hearing that he was "not sure" whether "given [his] anger at the parents, [he] became so emotional that [he] lost [his] sense of advocacy." Counsel's belief that Mirzayance's interests would not be advanced by conducting the insanity phase was groundless. Counsel had planned to present substantial evidence, including a "cadre of experts," to testify that Mirzayance was legally insane at the time of the killing. He did not know with any certainty that Mirzayance's parents would not testify and that he would lose the sympathy that could be gained from their testimony. That possibility remained open.

In addition, his decision was made not on the basis of the facts before him, but on speculation. The sole advantage counsel could identify of withdrawing the insanity plea was based on his speculation that the judge was sympathetic to Mirzayance and would sentence him to a psychiatric prison, but would sentence more harshly

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his or her act." CAL. PENAL CODE § 189.

if the jury found him sane. This is not only speculative, but also contrary to law. Under California law, withdrawal of the insanity plea amounted to a concession that Mirzayance was indeed sane. *See* CAL. PENAL CODE § 1016 (noting that absent a plea of not guilty by reason of insanity, a defendant is presumed to be sane).

Thus, even accepting counsel's emotional and speculative reasoning, his decision ultimately secured only the loss of this sole potential advantage. No actual tactical advantage was to be gained from counsel's advice; indeed, counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea. "Reasonably effective assistance" required here that counsel assert the only defense available, especially given the significant potential for success.

A "reasonable probability" exists that, but for counsel's recommendation that Mirzayance withdraw his insanity plea, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. If counsel had pursued the insanity phase of the trial, there is a reasonable probability—one "sufficient to undermine confidence in the outcome"—that the jury would have found Mirzayance insane. *Id.* As a result, Mirzayance would have been confined in a mental health facility rather than a prison, and confinement could be terminated when a sentencing court determined that his "sanity has been restored." CAL. PENAL CODE § 1026(a)-(b); *see also id.* § 190(a) (prescribing punishment for first-degree murder).

V.

Neither *Musladin* nor *Landrigan* alters this

analysis. In *Musladin*, the Supreme Court upheld a state appellate court determination that Matthew Musladin received a fair trial despite the victim's family wearing buttons bearing the victim's picture in the audience during Musladin's trial. 127 S. Ct. at 653-54. Addressing Musladin's appeal on habeas, the Court found that the state court's determination was not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court. *Id.*; 28 U.S.C. § 2254(d)(1). In so holding, the Court distinguished its prior precedents of *Estelle v. Williams*, 425 U.S. 501 (1976) and *Holbrook v. Flynn*, 475 U.S. 560 (1986), both of which addressed state actors that allegedly violated defendants' fair-trial rights. The Court reasoned that *Estelle* and *Holbrook* did not govern Musladin's situation because those cases dealt with "state-sponsored courtroom practices," not "private-actor courtroom conduct," and no Supreme Court holding required the state to apply *Estelle* or *Holbrook* to the defendant's case. *Musladin*. 127 S. Ct. at 653-54. Because there was no Supreme Court precedent addressing private actors, the state court's determination could not be "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

In *Landrigan*, a defendant who had affirmatively instructed his counsel—in the presence of the sentencing judge—not to present mitigating evidence, later claimed ineffective assistance of counsel for failure to present mitigating evidence. 127 S. Ct. at 1937. The state supreme court determined that counsel's failure to present mitigating evidence to the trial court during the sentencing phase of this capital murder trial was not ineffective assistance, which the United States Supreme

Court upheld as not contrary to or an unreasonable application of clearly established Supreme Court precedent. *Id.* at 1942. The Court reasoned that none of its precedents "addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court. . . . Indeed, [the Supreme Court] ha[s] never addressed a situation like this." *Id.* The Court continued, "[A]t the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence." *Id.*

In *Strickland*, the Court propounded the traditional two-pronged test applied to ineffective-assistance-of-counsel claims: (1) counsel's performance was deficient, falling below an "objective standard of reasonableness"; and (2) there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different. 466 U.S. at 687; *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). The Court has stated, unequivocally, that "[i]t is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Taylor*, 529 U.S. at 391. The Court has also stated that, because *Strickland* necessitates a "reasonableness" inquiry, the Court "ha[s] declined to articulate specific guidelines for appropriate attorney conduct." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

In light of the aforementioned principles, *Musladin* and *Landrigan* do not affect our prior disposition. First, unlike in *Musladin*, where the Supreme Court had not mandated that state courts apply the *Estelle* and

Holbrook tests to the private conduct at issue, the Court has stated that *Strickland* is clearly established law, thus mandating that state courts apply the *Strickland* test to all ineffective-assistance-of-counsel claims.

Second, post-*Landrigan*, the Supreme Court has made clear that, because the ineffective-assistance-of-counsel analysis is one of reasonableness, the facts of each case will be unique, even in habeas cases:

> That [a] standard is stated in general terms does not mean the application was reasonable. AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Musladin*, 127 S. Ct. at 656 (Kennedy, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland v. Washington*).

Panetti, 127 S. Ct. at 2858 (citations altered and omitted); *see also Rompilla v. Beard*, 545 U.S. 374, 377 (2005) ("This case calls for specific application of the standard of reasonable competence required on the part of defense counsel by the Sixth Amendment."); *Taylor*, 529 U.S. at 391 ("That the *Strickland* test 'of necessity requires a case-by-case examination of the evidence,' obviates neither the clarity of the rule nor the extent to

which the rule must be seen as 'established' by this Court." (citation omitted)). Thus, the fact that no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense does not carry the day; instead, the state may not issue an opinion that is an unreasonable application of the general rules established in *Strickland*, which is clearly established law that is binding on the states.

VI.

We affirm the district court's grant of habeas relief, albeit on different grounds.[2] The petition for writ of habeas corpus is granted if, within one hundred and twenty (120) days from the date the mandate issues, the state court does not grant Mirzayance the opportunity to reinstate his NGI plea and to conduct a sanity phase of trial as to that defense.

AFFIRMED.

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2. "We may affirm the district court's decision on any ground supported by the record, even if it differs from the district court's rationale." *Lambert v. Blodgett*, 393 F.3d 943, 965 (9th Cir. 2004), *cert. denied*, 126 S. Ct. 484 (2005).

FILED
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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Mirzayance v. Knowles, 04-57102

SUKO, District Judge , concurring in part and dissenting in part.

By virtue of the Supreme Court's granting certiorari, vacating the judgment and remanding the case (GVR order), this panel is required to reconsider its previous decision and, if warranted, to revise or correct it. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604, 607, 133 L.Ed.2d 545 (1996) (describing the use of a GVR order as potentially appropriate where intervening development reveals a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ."); *Youngblood v. West Virginia*, 126 S.Ct. 2188 (2006) (dissenting opinions describing the Supreme Court's GVR procedure). The GVR order directed this court to reconsider the case in light of *Carey v. Musladin*, 549 U.S.----, 127 S.Ct. 649 (2006). After reconsideration, and for the reasons set forth below, I concur in the conclusion of Part III of the memorandum disposition finding the district court and the magistrate judge misapprehended our prior remand order. However, as to Parts I, II, IV, V, and VI, I respectfully dissent.

While this court must conduct an independent review of the legal question, facts as determined by the district court are to be reviewed under the "significantly deferential" clearly erroneous standard, in which we

accept the district court's findings of fact absent a "definite and firm conviction that a mistake has been committed. *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (as amended); *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003). I accordingly disagree with the majority's independent review of the record without regard to the lower court's factual and credibility findings made after a four-day evidentiary hearing.

As set forth in my previous dissent, I also disagree with the majority's conclusion that the petitioner has satisfactorily demonstrated a violation of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). However, whether the judges sitting on this panel would or would not interpret *Strickland* the same as the state and lower federal courts is not the question presented in this appeal. As the *Musladin* decision reaffirmed, this courts role and authority is limited by AEDPA. 127 S.Ct. at 652-53. Specifically, habeas corpus relief may not be granted unless the state court's decision was contrary to, or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Id.* (citing 28 U.S.C. § 2254(d)(1) & (2)). This court is without authority to substitute its own judgment on the merits of the petition for that of the state court, in contravention of 28 U.S.C. § 2254(d).

To qualify as an "unreasonable application of clearly established federal law" sufficient to merit habeas corpus relief, the state court's decision to deny habeas must be more than just incorrect or erroneous: it must be "objectively unreasonable." *Schiro v. Landrigan*, --- U.S. ----, ----, 127 S.Ct. 1933, 1939 (2007) (noting that AEDPA changed the standards for granting federal habeas relief; the determination that a state

court's interpretation is unreasonable is a substantially higher threshold than the determination that a decision is incorrect).

In applying the deferential standard of AEDPA, "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004); *see also Musladin*, 127 S.Ct. at 654. Given the broad case-by-case nature of the *Strickland* analysis, the state court had significant leeway in determining petitioner's habeas petition. Indeed *Strickland* emphasizes that "[n]o particular set of detailed rules for counsel's conduct" is appropriate, but rather that courts must consider whether counsel's assistance was reasonable considering all the circumstances from counsel's perspective at the time. 466 U.S. at 688-89. It is nevertheless possible for a standard as general as *Strickland* to be applied in an unreasonable manner. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland*). However, the state court's resolution of Mirzayance's habeas petition was not an objectively unreasonable application of Supreme Court precedent.

Under the standards established in *Strickland*, to prevail on an ineffective assistance of counsel claim, a habeas petitioner must show that: (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Id.* at 687-88, 104 S.Ct. at 2064. In considering claims of ineffective assistance, courts are to address not "what is prudent or appropriate, but only what is constitutionally

compelled." *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114 (1987).

The majority concludes there was "substantial evidence available to show that Mirzayance was legally insane at the time of the killing," presumably reaching this conclusion by judging the quantity of experts who were subpoenaed to testify on Mirzayance's mental state during the NGI-phase of the trial. A simple comparative count as to the number of experts however, ignores the quality of the totality of evidence, the law, and the facts of the case. At a minimum, the record certainly demonstrates there is substantial ground for a difference of opinion as to whether the petitioner had any chance of succeeding on his insanity defense.

To prove the petitioner was insane it would have been the petitioner's burden to prove by a preponderance of the evidence that he was "incapable of knowing or understanding the nature and quality of his act", or that he was incapable of "distinguishing right from wrong", at the time of the commission of the offense. Cal. Penal Code § 25(b); *People v. Skinner*, 39 Cal.3d 765, 769 (1985) (holding that section 25(b) was intended to reflect two distinct and independent bases upon which a verdict of not guilty by reason of insanity might be returned). During the guilt-phase of the trial, the jury had heard the following facts of the crime: Mirzayance initiated the crime after entering the victim's bedroom with a knife in hand and a pistol in his pocket; he had waited until he was alone with the victim in the house before he closed the curtains and commenced the fatal stabbing and shooting attack; immediately after the murder he collected the knife and some of the spent bullet shell casings; he then returned to his apartment where he showered and put the bloody clothes into a trash bag; he concocted a false alibi on a

telephone answering machine; then drove to a Burger King where he dumped the bag containing the bloody clothes into the restaurant's trash container.

The defense strategy at trial was to secure no worse than a second degree murder conviction, a level of guilt that was conceded to the jury. In this pursuit, the jury had been given the opportunity to consider some of the petitioner's mitigating evidence of Mirzayance's mental state, but had implicitly rejected that evidence in finding him guilty of first degree murder. According to the jury instruction given at trial, the jury must have found that Mirzayance had "weigh[ed] and consider[ed] the question of killing and the reasons for and against such a choice, and ha[d] in mind the consequences" when he decided to kill Melanie Oohkhtens. The verdict of the jury shed light on its view of the petitioner's state of mind at the time of the offense. While, as the majority indicates, it did not legally defeat the insanity defense, it certainly was a blow to the likelihood of its success.

Moreover, according to the evidence adduced at the evidentiary hearing conducted by U.S. Magistrate Judge Zarefsky, each of the experts who were prepared to testify during the NGI-phase that the petitioner was insane because of his mental impairment, had also, on the same basis, opined that the petitioner could not have acted with premeditation, a finding the jury had rejected. Having so stated, this testimony would have subjected every one of the petitioner's "cadre of experts" to impeachment and cross-examination. The weaknesses of the petitioner's expert evidence was also revealed when upon cross-examination at the evidentiary hearing two of petitioner's experts testified that Mirzayance's actions were consistent with "goal-directed behavior designed to avoid detection." A third expert, Dr. Romanoff, in a written declaration indicated

he was not prepared to testify at the sanity-phase as to whether Mirzayance met the legal definition of insanity. Rather, he was to opine that in his diagnostic opinion Mirzayance had only a "potential" lack of understanding of the wrongfulness of his conduct at the time of the homicide.

Further undermining the possibility of proving Mirzayance insane, the prosecution had intended on calling two experts to testify the petitioner was legally sane, one of which was to testify that he had directly asked Mirzayance whether at the time of the offense he felt it was right or wrong to commit the murder and that Mirzayance had responded that he felt it was wrong. The other prosecution expert was prepared to testify that Mirzayance did not "even [come] close to meeting the criteria" for insanity and that his actions were goal oriented. Finally, petitioner's parents, who were to provide the "emotional" element of the defense, had indicated a "strong disinclination" to testify during the NGI-phase.

Under the circumstances presented to Wager, a reasonable attorney in the exercise of proper professional judgment could question the viability and merit of the insanity defense and conclude it was therefore inappropriate to pursue. *See e.g. U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 n.19 (1984) ("... [T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."); *Cepulonis v. Ponte*, 699 F.2d 573, 575 (1st Cir. 1983) ("... counsel need not chase wild factual geese when it appears, in light of informed professional judgment, that a defense is implausible or insubstantial as a matter of law, or, as

here, as a matter of fact and of the realities of proof, procedure, and trial tactics."). Counsel has no constitutional duty to raise every non-frivolous issue requested by a defendant. *Jones v. Barnes*, 463 U.S. 745, 751-54, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

The fact that the psychiatric defense was his sole defense remaining does not alter this analysis. This conclusion is echoed by the Seventh Circuit in its decision in *Jones v. Page*, 76 F.3d 831, 843 (7th Cir. 1996), wherein the court held:

> We refuse to hold that [counsel's] prudent, good-faith decision to forego an insanity defense (after investigation) constitutes ineffective assistance of counsel. Implicit in such a holding would be the notion that in order to represent a criminal defendant competently, an attorney must not only pursue each and every possible psychiatric defense, but perhaps also search out and present questionable 'expert' testimony in support of such arguments. A holding of this kind would defy common sense and contradict well-established case law . . . ."

76 F.3d 831 (internal citations omitted). More importantly, in light of all of the facts described above, the undersigned finds it is at least debatable whether *Strickland* mandated Wager to pursue the NGI defense, and thus it was not objectively unreasonable for the state court to conclude counsel's performance was not deficient under *Strickland*.

It is true that another lawyer in Wager's position might reasonably have requested a further continuance, might have taken time to attempt to persuade the parents to testify, and because it was the sole remaining defense available, may have chosen to forge ahead with

the defense no matter what. But *Strickland* admonishes courts to resist the natural temptation to play Monday-morning quarterback. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Even if petitioner were able to overcome the strong presumption that counsel's actions were within the range of reasonable professional assistance, to succeed under *Strickland* the petitioner must be able to also prove prejudice. This demands he demonstrate there is a "reasonable probability that but for the alleged unprofessional error that the outcome would have been different-probability sufficient enough to undermine the confidence in the outcome." 466 U.S. at 694. Given the facts of the crime, the petitioner's burden of proof, the jury's verdict, and arguable weakness of petitioner's expert evidence compared to the totality of the prosecution's evidence (including two court-appointed psychiatrists who found the defendant to be sane), the undersigned cannot conclude that the state court would have been "objectively unreasonable" in concluding the petitioner had failed to meet this burden. To the contrary, the state court could reasonably find the petitioner had not demonstrated a "reasonable probability" that he would have been found insane at the time he committed the murder and that his resulting sentence would have been any different.

In conclusion, in addition to the great deference to counsel's performance mandated by *Strickland*, AEDPA adds another layer of deference-this one to a state court's decision-when we are considering whether to grant federal habeas relief from a state court's decision. Under AEDPA, this court has no authority to grant habeas corpus relief simply because it concludes, in its independent judgment, that a state supreme court's application of *Strickland* is erroneous or incorrect. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1512,

146 L.Ed.2d 389 (2000). Consideration of whether the state court's application of *Strickland* was "objectively unreasonable" leads me to the conclusion that it was not. I therefore respectfully dissent from Parts I, II, IV, V, and VI of the amended disposition.

APPENDIX C

Supreme Court of the United States

No.
06-396

MICHAEL A. KNOWLES, WARDEN,

Petitioner

v.

ALEXANDRE MIRZAYANCE

ON PETITION WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Carey* v. *Musladin*, 549 U.S. ___ (2006).

IT IS FURTHER ORDERED that the petitioner Michael A. Knowles, Warden, recover from Alexandre Mirzayance Three Hundred Dollars ($300.00) for costs herein expended.

February 20, 2007

Clerk's costs $300.00

APPENDIX D

FILED
JUN 07 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDRE MIRZAYANCE, Petitioner - Appellee, v. MICHAEL A. KNOWLES, Warden, Respondent - Appellant.	No. 04-57102 D.C. No. CV-00-01388-DT Central District of California, Los Angeles ORDER

Before: HUG and WARDLAW, Circuit Judges, and SUKO,* District Judge.

A majority of the panel has voted to deny the petition for panel rehearing. Judge Wardlaw voted to deny the petition for rehearing en banc, and Judge Hug recommended denying it. Judge Suko would grant the petition.

The full court has been advised of the petition for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. Fed R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

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* The Honorable Lonny R. Suko, United States District Judge for the Eastern District of Washington, sitting by designation.

APPENDIX E

FILED
APR 10 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDRE MIRZAYANCE, Petitioner - Appellee, v. MICHAEL A. KNOWLES, Warden, Respondent - Appellant.	No. 04-57102 D.C. No. CV-00-01388-DT MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted November 18, 2005
Pasadena, California

Before: HUG and WARDLAW, Circuit Judges, and SUKO,** District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Lonny R. Suko, United States District Judge for the Eastern District of Washington, sitting by designation.

The Warden appeals the district court's grant of Alexandre Mirzayance's petition for writ of habeas corpus based on ineffective assistance of counsel in his state trial court proceedings. We affirm.

I.

We are required by the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996) ("AEDPA") to give significant deference to the decision of the state court. Where, as here, the state court has provided an adjudication on the merits of the habeas claim but has not explained its underlying reasoning or held an evidentiary hearing, however, we conduct an independent review of the record to determine whether the state court's final resolution of the case was an unreasonable application of clearly established federal law. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) ("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can detennine whether a silent state court decision is objectively unreasonable."); *Greene v. Lambert*, 288 F.3d 1081, 1088-89 (9th Cir. 2002) (explaining AEDPA standard of review where state court provides no reasoned explanation for its decision on petitioner's claim). We therefore independently review the state court record and the evidentiary hearing held by the district court upon remand, and conclude that the state court's denial of habeas relief to Mirzayance was "contrary to, or involved an unreasonable application of,

clearly established Federal law." 28 U.S.C. § 2254(d)(l).

II.

The district court and the magistrate judge misapprehended our prior remand for an evidentiary hearing on whether counsel's advice to withdraw the plea of not guilty by reason of insanity (NGI) was a true tactical decision that constituted "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The citation to *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987), indicated only that labeling a decision "tactical" does not necessarily mean that a true tactical choice, one "between alternatives that each have the potential for both benefit and loss," was made. *Id.* at 1249. The evidentiary hearing was necessary, as the state had not conducted one, to resolve the conflicting evidence as to counsel's reason for abandoning the insanity defense.

III.

Counsel's advice to Mirzayance to withdraw the insanity plea "fell below an objective standard of reasonableness," and therefore constitutes deficient performance. *Strickland*, 466 U.S. at 688. Counsel testified at the evidentiary hearing that he recommended withdrawal of the NGI defense "out of a sense of hopelessness," basing his decision on two factors. Counsel explained that he did not believe a jury that had found premeditation would find insanity, and therefore the jury's first-degree murder verdict rendered success in the insanity phase almost certainly unattainable. Further, the "triggering event" that precipitated his decision was the supposed refusal of

Mirzayance's parents to testify in the insanity phase.

The Warden argues that counsel's decision was "strategic," and thus not deficient performance. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable" under *Strickland*. *Id.* at 690-91. We conclude, however, that counsel did not make a true tactical choice. Counsel failed to consider the likelihood that the jury, after hearing the substantial evidence available to show that Mirzayance was legally insane at the time of the killing, might be persuaded that Mirzayance was in fact insane. As lay people, they might not recognize, as counsel thought they would, the seeming logical incompatibility between those two findings.[1] Moreover, counsel's fear that the jury would not find insanity after finding premeditation was unfounded, based on an unreasonable assumption that because the jury rejected the opinion of one mental health expert testifying on premeditation in the guilt phase, the jury would reject the testimony of four experts testifying on insanity in the NGI phase. Further, although counsel claims that Mirzayance's

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1. In fact, insanity and premeditation are not mutually exclusive. To establish insanity under California law, the defendant must prove "that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." Cal. Penal Code § 25(b). Incapacity to know the nature and quality of one's act and to distinguish right from wrong is not incompatible with capacity to premeditate and deliberate, which does not necessarily require knowledge or understanding of the nature of the act premeditated or deliberated. Indeed, California law explicitly provides that premeditation and deliberation do not require a showing that "the defendant maturely and meaningfully reflected upon the gravity of his or her act." Cal. Penal Code § 189.

parents refused to testify, the district court's finding that the parents did not refuse, but merely expressed reluctance to testify is correct. Competent counsel would have attempted to persuade them to testify, which counsel here admits he did not.

We disagree that counsel's decision was carefully weighed and not made rashly. Counsel himself admitted in the evidentiary hearing that he was "not sure" whether "given [his] anger at the parents, [he] became so emotional that [he] lost [his] sense of advocacy." Counsel's belief that Mirzayance's interests would not be advanced by conducting the insanity phase was groundless. Counsel had planned to present substantial evidence, including a "cadre of experts," to testify that Mirzayance was legally insane at the time of the killing. He did not know with any certainty that Mirzayance's parents would not testify and that he would lose the sympathy that could be gained from their testimony. That possibility remained open.

In addition, his decision was made not on the basis of the facts before him, but on speculation. The sole advantage counsel could identify of withdrawing the insanity plea was based on his speculation that the judge was sympathetic to Mirzayance and would sentence him to a psychiatric prison, but would sentence more harshly if the jury found him sane. This is not only speculative, but also contrary to law. Under California law, withdrawal of the insanity plea amounted to a concession that Mirzayance was indeed sane. *See* Cal. Penal Code § 1016 (noting that absent a plea of not guilty by reason of insanity, a defendant is presumed to be sane).

Thus, even accepting counsel's emotional and speculative reasoning, his decision ultimately secured only the loss of this sole potential advantage. No actual

tactical advantage was to be gained from counsel's advice; indeed, counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea. "Reasonably effective assistance" would put on the only defense available, especially in a case such as this where there was significant potential for success.

A "reasonable probability" exists that, but for counsel's recommendation that Mirzayance withdraw his insanity plea, "the result of the proceeding would have been different." *Strickland*, 446 U.S. at 694. If counsel had pursued the insanity phase of the trial, there is a reasonable probability—one "sufficient to undermine confidence in the outcome"—that the jury would have found Mirzayance insane. *Id.* As a result, Mirzayance would have been confined in a mental health facility rather than a prison, and confinement could be terminated when a sentencing court determined that his "sanity has been restored." Cal. Penal Code § 1026(a)-(b); *see also id.* § 190(a) (prescribing punishment for first-degree murder).

IV.

We affirm the district court's grant of habeas relief, albeit on different grounds.[2] The petition for writ of habeas corpus is granted if, within one hundred and twenty (120) days from the date the mandate issues, the state court does not grant Mirzayance the opportunity to reinstate his NGI plea and to conduct a sanity phase

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2. "We may affirm the district court's decision on any ground supported by the record, even if it differs from the district court's rationale." *Lambert v. Blodgett*, 393 F.3d 943, 965 (9th Cir. 2004), *cert. denied*, 126 S. Ct. 484 (2005).

of trial as to that defense.

AFFIRMED.

FILED
APR 10 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Mirzayance v. Knowles, 04-57102

SUKO, District Judge, concurring in part and dissenting in part:

I concur in the conclusion of Part II of the memorandum disposition finding the district court and the magistrate judge misapprehended our prior remand order. However, as to Parts III and IV, I respectfully dissent as I believe the majority has erred in concluding petitioner's counsel's decision to advise the petitioner to withdraw his NGI plea constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* mandates a highly deferential review of counsel's performance, viewed at the time of counsel's conduct. *Id.* at 689-90, 104 S.Ct. at 2065. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* In addition, findings of fact made by the district court are reviewed for clear error. *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001). This standard is significantly deferential because "findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations." *Rand v. Rowland*, 154 F.3d 952, 957 n. 4 (9th Cir. 1998) (en banc).

The purpose of the remand in this case was to

permit the district court to resolve the "conflicting reasons for the abandonment of the insanity defense." E.R. 139. The factual questions involved in this inquiry were resolved by the district court against the petitioner. First, the district court found that the trial counsel had made a rational, carefully considered and informed decision to forgo the insanity defense. Second, the district court found that the petitioner's parents strong disinclination to testify amounted to an express refusal to testify. Third, the district court found the attorney's decision to recommend withdrawal of the insanity defense was not affected by financial concerns. The district court also found defense counsel had correctly concluded that his experts' testimony had "significant weaknesses," noting that there were "convincingly detailed ways in which they could have been impeached, for overlooking or minimizing facts which showcased Petitioner's clearly goal directed behavior." [ER 179.]

These explicit factual findings of the district court were made following a four-day evidentiary hearing. Given the record before the district court and the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, I would find that counsel's performance was not unreasonable and thus not ineffective under *Strickland*.

I particularly disagree with the majority's legal and factual conclusion that "'[r]easonably effective assistance' would put on the only defense available, especially in a case such as this where there was significant potential for success." This conclusion suggests that to avoid violating *Strickland*, an attorney must always advance any potentially non-futile, colorable, affirmative defense regardless of its questionable merit or arguable chance of success. This

is not the standard established by *Strickland* and in fact suggests something more akin to the "nothing to lose" standard set forth in *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987). Furthermore, while there would have existed *a* potential for success had Mirzayance proceeded with his insanity defense, nothing in the record suggests he had (or is able to demonstrate) a "*significant* potential" or even a reasonable probability of success. In fact, the record and findings of the district court suggest quite to the contrary. To summarize, his experts' testimony had significant weaknesses, there were at least two prosecution experts prepared to testify Mirzayance did not satisfy the legal test for insanity, his parents were not going to testify, and the jury had just found him guilty beyond reasonable doubt of wilful, deliberate, and premeditated murder in the first degree, despite his concession to murder in the second degree. Additionally, as the magistrate judge correctly noted in his report and recommendation, under California law, during the insanity phase of the trial the *petitioner* would have bore the burden of proving by a preponderance of the evidence that he was insane at the time of the offense. Counsel's assessment of Mirzayance's insanity defense was neither unrealistic, nor unreasonable at the time. Finally, it is worth noting the district court decision which this panel is reviewing did not address the issue of prejudice under *Strickland*, having found the question immaterial given its conclusion petitioner could not have succeeded in proving counsel's deficient performance. [ER 200.]

Because Mirzayance has not established either counsel's constitutionally deficient performance or prejudice, I would reverse the district court's grant of habeas relief and remand with instructions to deny the habeas petition under *Strickland*. I therefore

respectfully dissent from Parts III and IV of the disposition.

APPENDIX F

FILED
CLERK, U.S. DISTRICT COURT
NOV 10 2004
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
NOV 15 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDRE MIRZAYANCE,	) CASE NO.) CV 00-1388 DT (RZ)
Plaintiff(s),	)
vs.	) ORDER ACCEPTING) FINDINGS,
MICHAEL KNOWLES, WARDEN,	) CONCLUSIONS AND) RECOMMENDATIONS) OF UNITED STATES
Defendant(s).	) MAGISTRATE JUDGE)

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and the Post-Remand Report and Recommendation of United States Magistrate Judge. Further, the Court has considered the objections of both Petitioner and Respondent, and has engaged in a de novo review of those portions of the Report to which the parties have objected. Having done so, the Court reluctantly accepts the Magistrate Judge's

Report and adopts it as its own findings and conclusions with additional comments provided herein.

This case was remanded by the Ninth Circuit, which ordered an evidentiary hearing on one specific claim of ineffective assistance of trial counsel. In that claim, Petitioner asserted that his trial counsel was ineffective because, after a jury found Petitioner guilty of first degree murder, his trial counsel advised him to withdraw his previous plea of not guilty by reason of insanity, and concurred in Petitioner's doing so.

The Ninth Circuit held that it was an abuse of discretion for the district court not to have conducted an evidentiary hearing. In short, the Ninth Circuit concluded that the record from the state court was not sufficient to determine the merits of Petitioner's claim. The sole purpose of the evidentiary hearing was to determine if Petitioner's trial counsel had a tactical reason for declining to proceed with the insanity defense. In its opinion, the Ninth Circuit noted that this decision to withdraw the insanity defense was made after the jury had already found Petitioner guilty of first degree murder, and further indicated that a tactical reason must have existed and must be one which offers some choice between alternatives which hold out the prospect for benefit.

After the evidentiary hearing, the magistrate judge concluded that the only way to implement the Ninth Circuit's mandate was to recommend a grant of the Petition as to that claim. The magistrate judge found that trial counsel had made a rational choice to forego the insanity defense; nevertheless, the evidence demonstrated that there was nothing for the Petitioner to lose in going forward with the insanity defense and it may have had some chance of success. As such, in light of the Ninth Circuit's decision in remanding the case,

which established the law of the case, the magistrate judge and the district court were left with no alternative other than to grant the Petition. In essence, the Ninth Circuit held that, if Petitioner could not gain anything from foregoing a viable defense, then the decision to do so could not be strategic, and, therefore, demonstrated deficient performance.

This holding by the Ninth Circuit, therefore, established the law of the case. Since the evidence introduced at the evidentiary hearing before the magistrate judge demonstrated that there were experts who could testify (even if subject to impeachment) and that Petitioner, having already been adjudged guilty of first degree murder, gave up nothing by going forward with the sanity phase of the trial. Under the Ninth Circuit's mandate, Petitioner was destined to relief.

DATED: NOV. 10, 2004 /S/
DICKRAN TEVRIZIAN
United States District Judge

FILED
CLERK, U.S. DISTRICT COURT
SEP -1 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDRE MIRZAYANCE, Petitioner, vs. MICHAEL KNOWLES, Warden Respondent.	CASE NO. CV 00-01388 DT (RZ) POST-REMAND REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California, the undersigned submits this Post-Remand Report and Recommendation to the Honorable Dickran Tevrizian, United States District Judge. The Court of Appeals has affirmed the prior ruling of this Court as to all claims except one claim of ineffective assistance of counsel. The appellate court remanded for this Court to hold an evidentiary hearing concerning counsel's advice that Petitioner withdraw his plea of not guilty by reason of insanity, instructing this Court to determine whether the decision to withdraw the plea represented a tactical choice or an abandonment of Petitioner's one viable defense. The undersigned concludes that, in order to implement the

Ninth Circuit's mandate, the Court should grant the petition as to that single claim and issue a conditional writ of habeas corpus.

I.

BACKGROUND

A. The Murder[1]

By all accounts, this case presents a tragedy. Petitioner Alexandre Mirzayance killed his cousin Melanie Ookhtens, then 19 years old, at her family's Los Angeles home on the evening of October 13, 1995. In tape-recorded statements to police shortly thereafter, Petitioner explained that Ookhtens was angry with him when she arrived home at around seven o'clock that evening because she found him there watching television at a time when they needed to go pick up her parents at the airport. Ookhtens then went upstairs to her bedroom. Some forty seconds later, Petitioner followed, knocked on her closed door, and asked what she was doing. She replied that she was getting dressed. Petitioner entered anyway.

Ookhtens immediately commanded Petitioner to get out. At this, Petitioner became angry, drew a hunting knife from his pocket and advanced towards her where she sat on her bed. She asked what he was doing with the knife. Petitioner stabbed her in the neck and abdomen. Ookhtens struck Petitioner and cried out for him to stop. He did stop stabbing her – and tossed his

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1. A more detailed summary of the evidence of Petitioner's crime appears in pages 3 through 7 of the June 28, 2001 Report And Recommendation of Magistrate Judge Ann I. Jones. District Judge Dickran Tevrizian adopted that Report on July 12, 2001.

knife out through the bedroom door – but then drew a .25 caliber pistol from his pocket and shot Ookhtens four times, killing her. Forensic evidence ultimately demonstrated that Ookhtens suffered nine stab wounds, two of which were in the chest and would have proved mortal. Any one of her four gunshot wounds also would have been fatal. One gunshot wound was in the abdomen; two were in her right temple, consistent with Petitioner's having shot her while he stood over her as she sat on her bed; and the fourth shot went into the top of Ookhtens' skull, consistent with Petitioner's having shot her while she was lying on the floor.

Petitioner gathered up the knife, some of the shell casings from the spent bullets, and some of his clothes that were at the Ookhtens residence, then returned to his own apartment in nearby Pasadena. He shed his bloody clothes, showered and deposited the stained clothes into a trash bag. At 8:07 p.m, he called the Ookhtens' home telephone and left the following message:

> Melan, it's me. I'm sorry to call you back late. I only want to say that I couldn't make it, I can't make it tonight because, well, Laurent called . . . well, I did not go out with him for a month, so he is like let's go out, because he works on weekends. So, go pick up your parents, say 'hi' to them, drive carefully. But I'll call you guys tomorrow, like in the afternoon, try to see you, or whatever else happens, don't how. Okay? So bye-bye.

After Petitioner left this message, at around 8:15 p.m, he called Laurent Meira – Petitioner's friend and the "Laurent" to whom he referred in his message – and

agreed to go pick Meira up in his (Petitioner's) car. After they were in the car together, Petitioner told Meira that it was no good to be "high" and that he had "messed up real bad." He confessed to Meira that he had shot Ookhtens three times in the head and once in the stomach. Petitioner stopped his car at a Burger King, where he dumped the bag containing the bloody clothes into the restaurant's trash container.

After Petitioner drove away from the Burger King, Meira suggested that Petitioner go to a police station. Petitioner thought for a moment, then agreed and drove to the Pasadena Police Station – after a brief stop at a convenience store to purchase a drink. At around 9:30 p.m, Petitioner told a Pasadena police sergeant that, about an hour after he had smoked a couple of hashish cigarettes, he had gotten into an argument with his cousin, shot her and killed her. After hearing and waiving his *Miranda* rights, Petitioner confessed in further detail, explaining, among other things, that he was angry at Ookhtens for hanging up on him the previous day. He later confessed to additional details, including his purchase of the .25 caliber handgun some five or six weeks earlier; the fact that he had been carrying the gun for the three days prior to the killing (but did not know why); and the fact that he had carried the knife on the day of the crime only. A urine sample provided by Petitioner after the crime tested negative for use of marijuana or hashish.

B. Procedural History

1. Trial

a. Guilt phase

In 1997, a Los Angeles County Superior Court jury convicted Petitioner of first degree murder. As discussed further below, the defense's principal goal during the guilt phase was Petitioner's conviction of only *second* degree murder, a degree of culpability that Petitioner's trial attorney, Donald Wager, chose to concede. Because Petitioner had pleaded Not Guilty By Reason Of Insanity ("NGI"), the sanity phase of the trial was scheduled to commence shortly after the jury's guilt-phase verdict; the jurors repeatedly had been advised that such a phase would occur if the guilt phase did not end in Petitioner's acquittal.

b. Abortive NGI phase

i. California procedure for NGI plea/defense

In California, a plea of not guilty by reason of insanity leads to a bifurcated trial. In the first phase, the fact-finder renders a verdict solely on the question of guilt. If the fact-finder returns a guilty verdict, then a second phase ensues in which the fact-finder determines whether the defendant carried his burden of proof, by a preponderance of the evidence, that he was not sane at he time of his offense. *See generally* CAL. PENAL CODE § 1026; 5 B. E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 669-676 (3d ed. 2000).

ii. Potential impact of NGI finding for Petitioner

The NGI phase effectively would decide which of two rather disparate confinements Petitioner received.

Petitioner's conviction of first degree murder required a sentence of life in prison with no possibility of parole for at least 25 years – unless, in the sanity phase to come, the jury found that he was legally insane. In that event, Petitioner would not be imprisoned but rather would be confined in a mental health facility indefinitely, until a judicial proceeding in the sentencing court determined he had recovered his sanity. *Compare* CAL. PENAL CODE § 190 (three possible sentences for first-degree murder are death, life imprisonment without parole, and imprisonment for 25 years to life) *with* CAL. PENAL CODE § 1026 (defendant, if found legally insane, is to be confined indefinitely, until sentencing court determines his "sanity has been restored"); *see generally* 5 B. E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 669-693 (3d ed. 2000).

On the morning the sanity phase was set to begin, however, Wager advised Petitioner to withdraw the NGI plea, which Petitioner did.

c. Sentencing

After that withdrawal and a subsequent sentencing hearing, the trial court sentenced Petitioner to state prison for twenty-nine years to life – four years for a weapon-use enhancement that the jury found true, plus twenty-five years to life for the first degree murder count. Although Wager asked Petitioner's parents to testify during the sentencing hearing, they did not do so, explaining that to do so would have been "too emotional" for them. *See* Evidentiary Hearing Transcript ("EHT") Jan. 27, 2004 at 175-76.

2. Petitioner's challenges in the state courts

Petitioner exhausted numerous claims for relief in the California courts on direct review and in a series of habeas petitions. The state courts rejected all of his claims for relief. None of the various state-court orders and opinions denying relief provided an explanation for the denial of the specific claim involved in this Post-Remand Report.

3. Prior habeas proceedings in this Court

Petitioner filed a habeas corpus petition presenting his claims in this Court on February 9, 2000. In July 2001, the Court rejected all of Petitioner's claims for habeas relief and entered Judgment dismissing the action with prejudice. Petitioner appealed.

4. Ninth Circuit's partial reversal, remand and mandate

Although the Court of Appeals affirmed that Judgment as to most of Petitioner's claims, it concluded that this Court should have held an evidentiary hearing regarding one of them. *Mirzayance v. Hickman*, No. 01-56839, 2003 WL 21086225 at **2, **7 (9th Cir. May 9, 2003). In reversing and remanding, the Ninth Circuit explained its concerns that Wager's performance may have been deficient:

> The district court dismissed [this claim] by citing to *Weber v. Israel*, 730 F.2d 499 (7th Cir. 1984). *Weber* involved the abandonment of an insanity defense, but there were tactical

reasons for its abandonment. The counsel in *Weber* abandoned an insanity defense because the prosecution had two psychiatric experts stating that Weber was not suffering from a mental disease or defect at the the time of the alleged crimes, one of which referred to Weber as "malingering," and defense counsel had no psychiatric reports to the contrary. *Id.* at 505. Defense counsel thought that if the jury knew an insanity defense would follow, the jurors would not give the defendant as much deference on the merits. *Id.*

In Mirzayance's case, the insanity defense was withdrawn *after* the guilt phase, and there was a cadre of experts [–] Dr. Markham [sic], Dr. Sharma, Dr. Vicary and Dr. Blum [–] prepared to testify that Mirzayance met the standard for legal insanity. *See Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987) ("[W]e cannot baptize the decision to forgo the insanity defense with the rejuvenating labels of 'tactical' or 'strategic' choice. Judges wisely defer to true tactical choices – that is to say, to choices between alternatives that each have the potential for benefit and loss . . . [but] we simply can see *no advantage* in the decision to bypass the insanity defense.") (emphasis in original); *see also United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) ("We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood of success, and a defense that he specifically stated he had every intention of presenting.").

> . . .
>
> A large number of experts were subpoenaed and ready to testify to Mirzayance's insanity. Mirzayance lacked knowledge of his own mental state. Defense counsel and those with whom defense counsel spoke gave conflicting statements about why defense counsel recommended the abandonment of the insanity defense on the morning it was scheduled to begin. Given these factors, the district court abused its discretion by not holding an evidentiary hearing on this . . . claim. An evidentiary hearing will assist in determining if there were tactical reasons for abandoning the insanity defense or if the withdrawal of the defense was a wholesale abandonment of the one viable and strong defense Mirzayance had.

Id. at **2-3 (emphasis in original). Accordingly, the Ninth Circuit remanded the case to this Court "with instructions to conduct an evidentiary hearing on whether [Petitioner's] counsel was deficient for recommending and concurring in the withdrawal of the insanity defense, and if so, whether this ineffectiveness prejudiced Mirzayance." *Id.* at **7.

II.

POST-REMAND PROCEEDINGS IN THIS COURT

After a September 15, 2003 status conference, the Court issued an order governing the briefing of and procedures for the evidentiary hearing, which the Court

scheduled for January 27, 2004.

A. Petitioner's Discovery Motion

Late in October 2003, before the evidentiary hearing occurred, Petitioner moved for authorization "to serve a subpoena on the Los Angeles Police Department to obtain the urine sample taken from petitioner on October 13, 1995 at the Pasadena Police Station." Petitioner argued two bases for granting his motion: (1) trial counsel's failure to insist on re-testing the sample could have constituted ineffective assistance of counsel, and, if so, then the Court reasonably could infer that counsel also was ineffective in deciding to abandon NGI; and (2) such discovery may be pertinent to cross-examination of Respondent's witnesses at the forthcoming evidentiary hearing. After a hearing on November 17, 2003, the Court denied Petitioner's discovery motion.

B. Evidentiary Hearing

The evidentiary hearing began as scheduled on January 27, 2004 and continued for three days of testimony and one day of argument. (Pursuant to stipulation, Petitioner presented most of his witnesses' direct testimony in writing.) The parties filed both pre- and post-hearing briefs, which the Court has considered in conjunction with the testimony and argument presented at the hearing.

1. Summary of evidence adduced

Although the parties do not dispute many of the events leading up to the decision by Petitioner's trial

attorney Donald Wager to withdraw the NGI plea, they offer contradictory views and evidence about a few key matters, including (1) whether Petitioner's parents announced to Wager, on the morning the sanity phase of trial was scheduled to begin, that they would not take the stand as planned; and (2) how the sanity phase of the trial would have proceeded, had Wager not advised Petitioner to withdraw the NGI plea.

a. Before the first-degree-murder verdict

The defense's principal strategy and hope was to secure a guilt-phase verdict no worse than *second* degree murder – a level of guilt that Wager conceded, in his presentation to the jury – and thereafter to secure an NGI verdict. *See* EHT Jan. 27, 2004 at 31, 36, 43-44, 50 (Wager); 172-73, 181 (Petitioner's mother, Amalia Mirzayance), 181; EHT Jan. 28, 2004 at 105 (Petitioner's father, Samuel Mirzayance). The importance of securing such a verdict lay in California's definitions of the two degrees of murder and of legal insanity. Any killing of a human being "with malice aforethought" is murder, *see* CAL. PENAL CODE § 187, but a jury only may convict a defendant of *first* degree murder if its members agree that the killing was accomplished in one of several statutorily-specified ways, including any killing that is "willful, deliberate and premeditated[.]" *See* CAL. PENAL CODE § 189. Employing a standard state instruction, Petitioner's trial judge defined those terms for the jury as follows:

> The word "willful" . . . means intentional.
> The word "deliberate" means formed or arrived at or determined upon as a result of

careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

CALJIC No. 8.20; *see* CT 244; RT 852-53. The defense suspected that a jury's finding, beyond a reasonable doubt, that Petitioner had "deliberated" and "premeditated" his killing of Ms. Ookhtens as a practical matter would cripple Petitioner's chances of convincing the jury later, during the sanity phase, that Petitioner nevertheless "was incapable of knowing or understanding the nature and quality of his . . . act and of distinguishing right from wrong at the time of the commission of the offense," CAL. PENAL CODE § 25(b), the legal test for insanity. *See* EHT Jan. 27, 2004 at 60, 88 (Wager "believed the return of a first degree verdict essentially legally meant there could be no support for an NGI finding by this jury.").

Wager called only one expert witness during the guilt phase, psychologist Paul Satz, Ph.D. (One of Wager's strategies was to save testimony of the rest of his mental health experts – for he had retained several others – for the sanity phase. *See* EHT Jan. 27, 2004 at 49.) Wager considered Dr. Satz's testimony "terrific on direct," when Dr. Satz gave testimony suggesting that Petitioner had not premeditated and deliberated the murder. *See* RT 462-63, 467, 502-03, 505. But Wager said Dr. Satz proved "an absolute disaster on cross[-examination]," perhaps in reference to Satz's inability to explain the meaning of the terms "premeditation" and "deliberation" and his juror-annoying fidgeting with a retractable pointing device. *See* RT 520-21, 786-87; *see* Ex. 20 (Wager letter to Satz dated Aug. 4, 1997) ("Your testimony on cross examination was inadequate and showed lack of preparation"; "Your use of the expandable metal pointer by rapidly and repeatedly opening and closing it drew remarks from the jury after the verdict.").

b. The day of the first-degree guilt verdict

The jury dashed the defense's hopes by finding Petitioner guilty of first degree murder. Immediately after the announcement of that verdict on the morning of Thursday, June 26, 1997 (and the temporary removal of the jurors from the courtroom), Wager candidly told the trial judge, in reference to his hopes for the sanity phase, that "[o]bviously . . . this is not an uphill battle at this point[;] this is a perpendicular climb. Like mountain climbing. And I want to assess who we're going to call. I want to talk to the doctors in view of the [first degree murder] finding." RT 869; *see* RT 870 (specifying that what he wished to discuss with the doctors was "the first"). The trial judge agreed to a recess – a "cooling off period" – until the following morning, when the NGI phase was to begin. RT 869-70.

Before this Court, Wager stated that the jury's first-degree verdict affected him "very strongly" emotionally. EHT Jan. 27, 2004 at 98-99. Any remaining chance of securing an NGI verdict, Wager explained, now depended (in his view) on presenting some "emotional pact" testimony *by Petitioner's parents*, which Wager had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase. *See* EHT Jan. 27, 2004 at 100-02 (after disappointing guilt-phase verdict, Wager thought parents' testimony "was the linchpin to any chance of success" remaining for defense in NGI phase).

Later on the day of the guilt-phase verdict, Wager spoke to two of the several mental health experts who stood ready to testify that Petitioner was legally insane, psychologist Richard Romanoff, Ph.D., and psychiatrist Bennett Blum, M.D. Dr. Romanoff testified that he

spoke with Wager for an hour; that at "no time did Mr. Wager raise the issue of waiving the insanity phase of the trial in his discussions with me"; and that, after the call, he prepared for an additional two hours for his NGI-phase testimony. Ex. 4 ¶ 10. Dr. Blum spoke with Wager around 6:30 on the evening of the guilty verdict, but the two men's testimony conflicts as to what Wager said about withdrawing the NGI plea. Dr. Blum testified that Wager told him he (Blum) "was not going to be needed for any testimony in the case[,] as he [Wager] was going to withdraw the insanity plea. He said that he did not think he could win the NGI case before the jury he had. Nothing was mentioned about the parents' testimony." Ex. 1 ¶ 9. Wager did not recall discussing with Blum a waiver of the NGI plea – although he allowed on cross-examination that he "might have done so in an academic manner[.]" EHT Jan. 27, 2004 at 102. But "assuming I discussed that with Dr. Blum," he cautioned, "it would [have been] the result of 'I wonder if we can have any chance at all and whether it should just be waived' – a musing kind of thing, I would think." *Id.*

Notwithstanding the two doctors' testimony suggesting otherwise, Petitioner does not dispute, in his post-hearing briefs, that Wager "had not made a final decision to withdraw the insanity defense at the time he picked up petitioner's parents [the following morning] to drive them to court." *See* Pet'r's Post-Hg. Br. at 2.

c. Friday morning

The parties present conflicting evidence about two conversations held while Wager and Petitioner's parents were en route to court on the next morning: one between Petitioner's parents and Wager, and another,

immediately thereafter, between all three of them and James Lund, a civil attorney who had represented Petitioner's father Samuel for over 30 years and become his friend during that time. *See* EHT Jan. 28, 2004 at 103.

i. Did Petitioner's parents refuse to testify?

Most sharply splitting the parties is the following factual issue: did Petitioner's parents, while traveling with Wager to court on Friday, June 27, 1997, announce their refusal or unwillingness to testify during the sanity phase?

(a) Wager's testimony

Wager says they did, in an announcement that shocked him then and still angers him today. *See* EHT Jan. 27, 2004 at 105. "I don't recall what conversation preceded their announcement," Wager explained at the evidentiary hearing, *id.* at 103, but

> shortly before we were at the [court] parking lot, within five minutes or so, I was talking to the Mirzayances about testifying. As I was on the way, Mr. Mirzayance says, "We're not going to testify."
> Q: [from Respondent's attorney] What was your reaction?
> A: Startled.
> Q: Did they give a reason?
> A: No.

EHT Jan. 27, 2004 at 58. Wager testified that he

expressed disbelief, becoming "angry and emotional"; that he explained to Petitioner's parents that Petitioner had no chance of securing an NGI verdict without the "emotional quality from nonprofessional witnesses" that Mr. and Mrs. Mirzayance's testimony could provide; and "that they were abandoning their son." The parents' response to Wager's statements, he testified, "was kind of flat, and I had no influence over them." *Id.* at 61, 103. "So that's when I asked, 'Let's call Lund,' and we did," Wager testified, referring to the Mirzayances' civil attorney, James Lund, who had helped to select Wager as Petitioner's attorney. *Id.* at 61. (The Court summarizes the evidence about the Lund phone call below.)

(b) Petitioner's parents' testimony

For their part, the Mirzayances deny that they ever refused, or stated their refusal, to testify for Petitioner, either on that morning or at any other time. But as Mrs. Mirzayance recounted in her declaration, which served as her direct testimony at the evidentiary hearing, Petitioner's parents *did* believe that Wager had failed to prepare them adequately for their key testimony – either before the guilt-phase verdict, *see* Ex. 12 ¶ 57, or afterwards:

> Even after the verdict of first degree murder came in, we were not talked to that afternoon by Mr. Wager in preparation for our testimony for the insanity trial. Instead, he picked us up at our hotel and took us to the court . . . . During that ride to court, Mr. Wager said he would be putting Sam and myself on the witness stand as the first

> witnesses. I commented to him that he had not prepared us for testimony as to what he would ask us on the witness stand. Mr. Wager then started saying that Alex [Petitioner] would not have a chance with this jury to win the insanity trial. 'We'll be humiliated,' he said and recommended that we give up the insanity trial. He said he would try to have Alex placed in a secure mental hospital. My husband and I said that Mr. Wager was the attorney and knew what was best to do.
>
> Sam [Mirzayance, Petitioner's father] suggested that Mr. Wager talk to James Lund. . . . Mr. Wager called him on a portable phone while in the parking lot of the courthouse. I was upset at what was happening. I could not hear what Mr. Lund said and do not recall what Mr. Wager told him. Both I and my husband talked to Jim Lund too on that same call. *At no time did I or my husband refuse to testify on behalf of our son at the trial.*

Ex. 12 ¶¶ 59-60 (emphasis added). When asked on cross-examination about whether she ever "expressed any reluctance to testify," Mrs. Mirzayance denied doing so – but volunteered an additional statement stressing that she felt unprepared to testify: "Never. Never. And he [Wager] always said he would prepare us." EHT Jan. 27, 2004 at 170.

Mr. Mirzayance's version of these events was nearly identical to his wife's. *See* EHT Jan. 28, 2004 at 104-05, 107; Ex. 13 ¶¶ 54-55, 57. In addition, Mr. Mirzayance testified that Wager never appeared upset during the morning car ride to court, only "very reluctant," contrary to Wager's own testimony about his strong,

negative emotional reaction. EHT Jan. 28, 2004 at 107.

At the sentencing hearing held shortly thereafter, Petitioner's parents did not testify; Petitioner's mother testified at the evidentiary hearing that such would have been "too emotional" for her. EHT Jan. 27, 2004 at 176.

ii. The phone call to James Lund

Although the parties do not dispute that a call was made to Lund from the car that morning, they give conflicting accounts about that call.

(a) Wager's testimony

Wager testified that Petitioner's parents spoke with Lund first, and after –

> I got on the phone, I said, "You know, Jim, you've got to convince them to testify. We had planned that they would testify[.]" . . .
> Q: [by Respondent's attorney] What was Lund's reaction to your comments?
> A: He said to me, "Can't you proceed without them?"
> Q: What was his demeanor?
> A: Calm.
> Q: What was his tone of voice like?
> A: Calm.
> . . .
> A: . . . I think in response to him, I said, "No, we can't. We discussed this. We went over this. We planned this. We need them as witnesses."

EHT Jan. 27, 2004 at 64. Wager provided additional

details about this conversation on cross-examination:

> A: As I recall his words, it's just[,] you could put them on – you could put the defense on without them.
> Q: [by Petitioner's counsel] And you said what to that?
> A: . . . I was angry then because of my impressions I got from what he said and how he said it as to what I thought had been occurring. And I made a few comments to him, and he kept the same position.
> . . .
> Q: Did you say to him[,] why don't you use your best efforts right now and speak with Mr. and Mrs. Mirzayance and talk to them about testifying on behalf of Alex?
> A: No.

Id. at 105-06.

(b) Lund's testimony

Lund testified to a much different phone call, even disputing Wager's account that the Mirzayances, and not Wager himself, spoke with Lund first:

> [A]t about 8:15 a.m. . . . , I received a call at my home from Mr. Wager, who said he was in his car with Sam and Amalia. Mr. Wager told me that Sam and Amalia were in too much pain to testify; that he had spoken with [one of the defense's mental health experts,] Dr. Ronald Markman[,] who had assured Mr. Wager that

> he could arrange for Alexandre to be placed in a safe psychiatric prison treatment facility, such as Atascadero . . . ; and that, therefore, he (Mr. Wager) was going to withdraw the not guilty by reason of insanity plea and rely on the trial judge to instruct that Alexandre be sent to Atascadero or a similar institution at the time of sentencing.

Ex. 9 ¶ 23. Lund's declaration thus indicates that, by the time of the phone call, Wager *already had made* his decision to withdraw the NGI plea. On the witness stand, however, Lund changed this position somewhat, testifying that Wager indicated during the call that a decision to withdraw "was under very serious consideration by him." EHT Jan. 28, 2004 at 96.

In addition to the parents' "pain" and Dr. Markman's assurances, Lund testified, Wager said he based the NGI-withdrawal decision on his view that the trial judge was sympathetic to Petitioner and indeed would sentence him to a mental hospital rather than prison. *Id.* ¶ 24 "This prompted my question to Mr. Wager as to what would be lost by going forward with the insanity defense, [given] all of the available expert testimony finding Alexandre legally insane. Mr. Wager responded that he wanted to avoid a finding that Alexandre was 'Sane' . . . [and] that he could not win an NGI finding before the jury he had." *Id.* ¶¶ 24-25. Lund testified that he thought it would be better to get Petitioner's experts' testimony on the record. *Id.* ¶ 25. Lund next spoke briefly with Petitioner's parents before the call ended. "Neither Sam nor Amalia ever told me that they refused to testify." *Id.* Lund jotted down a page of notes about the call a few minutes later. EHT Jan. 28, 2004 at 94; *see* Ex. 9 (internal exhibit D). Those

notes largely are consistent with Lund's testimony.

Those notes also reflect, immediately above the portions relating to the phone call on the morning of June 27, 1997, that Lund had communicated with Petitioner's father on the preceding evening, the evening after the jury had returned its first degree murder verdict. At 8 p.m., according to Lund's notes, Lund called Petitioner's parents and left a message. At 10 p.m., again according to Lund's notes, Samuel Mirzayance returned the call, and the two men discussed the jury verdict. "Sam disconsolate," Lund's notes appear to state, although the last half of the second word is not entirely clear. *See id.* At the evidentiary hearing, Lund was not questioned about, and did not testify about, these two phone calls.

d. How the NGI phase would have proceeded

Based on the evidentiary hearing, the Court summarizes how three sets of NGI-phase witnesses' testimony could have proceeded: Petitioner's experts, the trial-court-appointed experts whom the prosecution planned to call and, perhaps, Petitioner's parents.

i. Petitioner's experts' testimony

Four psychiatrists and one psychologist were prepared to testify that Petitioner met the legal definition of insanity: Bennett Blum, M.D., Ronald Markman, M.D., Kaushal Sharma, M.D. and William Vicary, M.D., and Richard Romanoff, Ph.D. As noted below, all of them would have faced impeachment for, among other things, the fact that they *also* concluded that Petitioner had committed the killing without

premeditation or deliberation (or without both) – a conclusion colliding head-on with the jury's guilt-phase finding that the evidence proved premeditation and deliberation beyond a reasonable doubt.

(a) Dr. Blum

A central portion of Dr. Blum's summary declaration, which makes reference to numerous reports, tests and other documents supporting his conclusion, is as follows:

> . . . [Petitioner] met the legal standard for insanity at the time of the offense because his paranoid mental disorder caused him to lack the ability to understand the wrongfulness of his conduct. His psychotic and paranoid perspective made him think he needed to defend himself against a non-existent imminent, life-threatening attack. . . .
>
> *For the same reasons stated in my report, I do not believe [Petitioner] committed the homicide acting with premeditation and deliberation.*

Ex. 1 ¶¶ 5-6 (emphasis added).

On cross-examination at the evidentiary hearing, Dr. Blum conceded that Petitioner had told "different stories to different doctors" about the history of his symptoms, such as reported hallucinations of spiders and cats, and his (Petitioner's) subjective perceptions at the time of the crime. The doctor also admitted that one of three or four possible reasons for these differences was that Petitioner was simply lying, *see* EHT Jan. 28, 2004 at 13-17, 24-27, and that another possible reason

would be the interviewer's failure to inquire thoroughly. *See id.* at 44. Furthermore, Dr. Blum agreed that Petitioner had told him he had walked into his victim's bedroom while carrying a gun on his person and holding a knife in his hand, "with the intent of scaring her"; that such conduct does not indicate Petitioner was afraid of the victim at that time; and that Petitioner initiated the ensuing violence and ultimately "was firing at her head," with at least one shot fired while the victim was lying motionless on the floor. *Id.* at 21-22. In the immediate aftermath of the killing, Dr. Blum testified, Petitioner had not called the police and instead had taken several actions "consistent with goal-directed behavior, designed to avoid detection." Among these acts were his (1) retrieval of fallen bullet shell casings which could have tied Petitioner to the murder weapon; (2) returning home where he washed off and changed his clothes; (3) disposing, in a trash bin, of the bloodied clothes he had been wearing; and (4) recording a post-mortem, alibi-supporting message for the victim on her answering machine. *Id.* at 22-24. Dr. Blum admitted that "a reasonable inference [from such acts] is that someone who wants to avoid detection believes he's done something wrong." *Id.* at 24.

(b) Dr. Markman

Dr. Markman, who conducted a review of Petitioner's background similar to that undertaken by Dr. Blum, stated his opinion that Petitioner –

> suffered from a delusional disorder that was facilitated by his chronic use of cannabis. . . . I believed [Petitioner] met the legal standard for insanity at the time of the offense because

> his paranoid mental disorder caused him to lack the ability to understand the wrongfulness of his conduct. . . . [F]or the same reasons, *his ability to deliberate was defective*. . . .
>
> . . .
>
> . . . I am not aware of the reasons for [Wager's] not calling me to testify at the guilt phase on the lack of deliberation issue. *The facts prior to the homicidal outburst were inconsistent with a deliberated intent to kill.*

Ex. 2 ¶¶ 4, 7 (emphasis added). Dr. Markman also denied telling "any member of the defense team that, [were Petitioner to forgo] the insanity defense, I had the authority to effect [his] placement in a psychiatric facility." *Id.* ¶ 12.

On cross-examination, Dr. Markman acknowledged the tension between the jury's finding of deliberation, on the one hand, and, on the other hand, his opinion – formulated prior to that finding – that Petitioner lacked the ability to deliberate. *See* EHT Jan. 28, 2004 at 54. As in the cross-examination of Dr. Blum, the State's attorney queried Dr. Markman not only (1) about Petitioner's initiation of violence after entering the victim's bedroom, with a gun on hand and a knife in hand, but also (2) about Petitioner's numerous activities thereafter, such as collecting shell casings, disposing of bloody clothing, and recording a disingenuous alibi phone message, all of which Dr. Markman conceded "could certainly" be "goal-directed activit[ies] to avoid detection." *See id.* at 56-57.

The State's attorney called Dr. Markman's attention to the portion of the report prepared by one of the prosecution's mental health experts, Seawright Anderson, M.D., stating, "On direct query, when asked

if he thought it was right or wrong to stab and shoot [the] victim, defendant admitted feeling that these actions were wrong at the time of present offense." *Id.* at 58; *see* Ex. 25-4 (Anderson report). Dr. Markman had not read Dr. Anderson's report when he prepared his own declaration but testified that, without a better understanding of the precise context in which Petitioner allegedly said this, he (Dr. Markman) could not judge whether it would have changed his sanity opinion. EHT Jan. 28, 2004 at 57-60.

(c) Drs. Sharma, Vicary and Romanoff

Drs. Sharma, Vicary and Romanoff did not testify in person at the evidentiary hearing. Instead, the parties stipulated to admitting their declarations into evidence, with Respondent waiving cross-examination. *See* Pretrial Stip. (filed Jan. 20, 2004) ¶¶ 1-3; Exs. 4, 5 & 6. Like Drs. Blum and Markman, Wager had subpoenaed these three doctors to testify during the NGI phase of Petitioner' trial. Briefly stated, Dr. Sharma was prepared to testify that Petitioner –

> suffered from a combination of long-standing psychological problems, paranoid ideation, intellectual limitations and drug abuse.
>
> As a result of these mental deficits and disorders, I concluded that during the homicide *he did not act with premeditation and deliberation*[,] and that he would have met the standard for legal insanity at the time of the offense[,] because his ability to understand the wrongfulness of his conduct was substantially impaired by his mental illness.

Ex. 5 ¶¶ 4-5 (emphasis added).

Similarly, Dr. Vicary was prepared to give NGI-phase testimony that, in his opinion,

> Alex suffered from a chronic psychotic illness . . . [and] met the standard of legal insanity at the offense. I also stated that he was so grossly psychotic at the time of the offense that *it was unlikely that he formed the elevated homicidal intents of premeditation, deliberation or a malicious intent to kill.*

Ex. 6 ¶ 3 (emphasis added).

Finally, Dr. Romanoff's declaration reflects that he was prepared to testify *in the guilt phase* that Petitioner was psychotic at the time of the crime and, therefore, lacked the ability to deliberate; that the evidence of premeditation was lacking; and that "there may have been a basis for a jury finding of an absence of malice." Ex. 4 ¶¶ 8-9. Dr. Romanoff also prepared himself to give testimony at the sanity phase, but, had he been called to do so, he –

> would have preferred to provide only the psychological data and my diagnostic opinion as opposed to a legal opinion on the sanity standard in this case. I believe that this was not an easy case in which to make this legal assessment. However, if pressed, I could have provided strong evidence supportive of a theory that [Petitioner's] psychotic thought processes . . . resulted in a gross misperception of reality and a consequent potential lack of understanding of the wrongfulness of his conduct at the time of the homicide.

Id. ¶ 11.

ii. Prosecution expert's testimony

Two court-appointed psychiatrists were ready to testify that Petitioner, although mentally ill, was legally sane at the time of the killing: Seawright Anderson, M.D. and Sarabjit Sandhu, M.D. Both doctors had conducted investigations of Petitioner's mental state roughly comparable to those undertaken by the defense's experts.

(a) Dr. Anderson

Dr. Anderson diagnosed Petitioner as having "a schizoaffective disorder of the bipolar type." EHT Jan. 29, 2004 at 9. As noted briefly above, however, Dr. Anderson reported putting a "direct query" to Petitioner as to whether he (Petitioner) had felt "it was right or wrong to stab or shoot [the] victim." According to Dr. Anderson, Petitioner responded that he felt "that these actions were wrong at the time of the present offense." *See id.* at 10-12; Ex. 25-4.

On cross-examination, Dr. Anderson admitted that, at the time of his interviews, Petitioner was taking certain medications ordinarily prescribed only to persons diagnosed as psychotic; that the statements attributed to Petitioner in the doctor's report largely were paraphrasings, not direct quotations (except where the report employed quotation marks); and that, during the second of two interviews with Dr. Anderson, Petitioner had indicated that he did not know why he killed the victim. *See id.* at 20-29. The doctor agreed with Dr. Satz's assessment that Petitioner "was probably psychotic," or at least "had psychotic

episodes," for "most of his life," but he (Dr. Anderson) did not believe that Petitioner was psychotic "all the time [for] all of his life, no." *Id.* at 47. Dr. Anderson also agreed with Dr. Blum's core diagnosis of Petitioner as "schizophrenic or schizoaffective, a chronic psychotic illness." *Id.* at 48. Finally, Dr. Anderson agreed with Dr. Sharma's view that Petitioner was "impaired" at the time of the crime "due to long-standing psychological problems, paranoid ideations, intellectual limitations and drug abuse. . . ." *Id.* But Dr. Anderson differed with the defense's experts in assessing whether Petitioner's various clear impairments did, or did not, satisfy the legal test for insanity – a test which, Dr. Anderson explained, is not necessarily satisfied by every "psychotic." *Id.* at 50-52.

(b) Dr. Sandhu

The key portion of Dr. Sandhu's report states that Petitioner "was sane at the time of the commission of the instant offense. He understood the nature and quality of his act[,] and he was clearly able to distinguish right from wrong. However, there are several factors that should be considered in mitigation," including his history of "emotional problems," limited intellectual abilities and regular use of marijuana and hashish. *See* Ex. 26-1. In his direct testimony, Dr. Sandhu emphasized his opinion that Petitioner did not "even [come] close to meeting the criteria for either" of the two prongs of the test for legal insanity. EHT Jan. 29, 2004 at 60-61. Dr. Sandhu explained that Petitioner failed the first part of the test, which requires an inability to know the nature and consequences of one's actions, because –

> [h]is actions were goal oriented. He was purposeful. He knew – he had a gun which he used. He had a knife. Just to make it more clear, there are defendants or individuals I have examined who carry around strange objects and given them strange connotations that are not reality based .... There was none of that here. He was quite cognizant of what he was doing in terms of his behavior, his actions, all throughout.

Id. at 61. Petitioner's conduct immediately after the killing, whereby he sought "to cover up his tracks" and establish an alibi, demonstrated to Dr. Sandhu that Petitioner understood that his actions were wrongful – and they thus weighed against him on the second prong of the insanity test, which requires an inability to know right from wrong. *Id.* at 65.

On cross-examination, Dr. Sandhu stated that "there was no premeditation and deliberation that [he] saw" in the homicide, and that, in that respect, he agreed with the similar conclusion of Dr. Sharma (albeit not with all of the reasons Dr. Sharma gave for his conclusion). *Id.* at 73. Like Dr. Anderson, Dr. Sandhu admitted that, when he was meeting with and evaluating Petitioner in custody, Petitioner had been medicated with drugs properly given only to persons diagnosed with a "psychosis" and "depression" *Id.* at 79-81. Dr. Sandhu disagreed, however, with Dr. Satz's view that Petitioner "was probably psychotic most of his life" and with similar assessments by Drs. Markman, Sharma and Romanoff that Petitioner was "psychotic" at the time of the crime – although Dr. Sandhu opined that Petitioner may have *become* psychotic *after* the crime, inasmuch as "what he did would be the

proverbial last straw" for his troubled mind. *Id.* at 97-98.

iii. Petitioner's parents' testimony

Assuming that, contrary to Wager's testimony, Petitioner's parents had not refused to testify during the sanity phase, they could have testified about Petitioner's mental health problems dating back to his early childhood. *See* Ex. 12 ¶¶ 9, 14-46; Ex. 13 ¶¶ 9, 11-39. Wager testified that, in the course of eliciting such background information, he had "wanted to bring out a strong emotion from both of them, hopefully tears," in contrast to the clinical testimony he anticipated from the defense's expert witnesses. *See* EHT Jan. 27, 2004 at 54, 140. Wager explained that he chose not to conduct formal, question-and-answer preparations for the parents' testimony, because he did not want the parents' "strong emotions [to] come out in the lawyer's office [instead of] the courtroom." *Id.* Suffice it to say that what Wager characterizes as his effort to preserve the freshness of the parents' hoped-for release of emotions, Petitioner instead characterizes as Wager's failure to prepare his parents properly for key anticipated areas of testimony.

2. Findings

Both parties' versions of the events immediately preceding Wager's decision to withdraw Petitioner's NGI plea have several weaknesses. The Court makes three key findings, as further discussed below: (1) that Wager did not act rashly, but instead made a decision that appeared reasonable to him and his co-counsel on June 27, 1997, in light of the guilt-phase verdict and the

parents' statements to him on the way to court that morning; (2) that neither party's witnesses stated the full truth about what was said during the parents' and Wager's trip to court on June 27, 1997, but that the evidence on balance favors Wager's position; and (3) that Wager's decision was not influenced, as Petitioner argued, by concerns that Petitioner's parents would pay him less than what he felt he was owed.

a. Wager's decision was carefully considered, not rashly made

The evidence supports Respondent's assertion that Wager carefully weighed his options before making his decision final; he did not make it rashly. Wager did not make up his mind until after the ride to court with Petitioner's parents on the morning of Friday, June 27, 1997. Although Dr. Blum was a credible witness and the Court has no reason to believe he sought to deceive, nevertheless his testimony – that Wager telephoned him the preceding evening and told him that Blum's testimony the following day would not be needed, because Wager was going to withdraw the NGI plea – is outweighed, collectively, by other credible evidence. Dr. Romanoff also received a call from Wager on June 26, 1997, and the two men spoke "for about an hour" with no mention by Wager of a withdrawal decision or that Dr. Romanoff's testimony would not be needed. It is unlikely that Wager would tell Dr. Blum of such a momentous decision while failing to make any mention of it at all in an hour-long talk with Dr. Romanoff the same afternoon. Furthermore, Wager arranged with Dr. Markman to come to court the next morning to testify. More plausible than Dr. Blum's statement, on this record, is what Wager himself suggested at the

evidentiary hearing: that he may have been "musing" to Dr. Blum about a withdrawal, but that he did not announce an actual decision. Furthermore, even Petitioner, in his post-hearing brief, stated that Wager "had not made a final decision . . . at the time he picked up Petitioner's parents to drive them to court." Pet'r's Post-Hg. Br. at 2.

Wager's strategy at the NGI phase had been to appeal to the jury in one or both of two ways that depended entirely on the heartfelt participation of Petitioner's parents as witnesses. First, he wanted to "humanize" Petitioner by having his parents discuss Petitioner's youth and prior mental-health symptoms, partly in the hope of bringing the parents to tears and thereby creating an emotional impact upon the jury. Second, Wager may have needed the parents to provide the only available direct, contemporaneous evidence of Petitioner's having had hallucinations in the past. (Perhaps Petitioner could have presented evidence of those hallucinations through several of his mental-health experts, although the evidence may not have been admissible. Such testimony, moreover, likely would not have had the heft of the parent's testimony, because the experts' reports about his hallucinations merely reflected what Petitioner and others had said after those events. Moreover, Wager knew that, although he had experts lined up to testify, their testimony had significant weaknesses. When pressed at the evidentiary hearing, he convincingly detailed ways in which they could have been impeached, for overlooking or minimizing facts which showcased Petitioner's clearly goal-directed behavior. EHT Jan. 27, 2004 at 138-40.

But Wager's NGI-phase strategy became impossible to attempt once Petitioner's parents, during their trip to

court on the June 27, 1997, expressed – instead of their eagerness to testify on their son's behalf – their reluctance to do so, based on what they said was Wager's failure to prepare them adequately. (The Court's findings as to the parent's statements during that trip are discussed more fully in the section immediately below.) All Wager was left with were four experts, all of whom reached a conclusion – that Petitioner did not premeditate and deliberate his crime – that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof. The experts were subject to other impeachment as well. One of them, Dr. Vicary, recently had been involved in a well-publicized criminal case, in which he allegedly had altered his notes. EHT Jan. 28, 2004 at 89:3-7. Wager discussed the situation with his experienced co-counsel, Lawrence Boyle, who concurred in Wager's proposal that he recommend to Petitioner the withdrawal of the NGI plea. Among other things, Boyle believed that evidence of Petitioner's past hallucinations could come in only through Petitioner's parents. *See* EHT Jan. 27, 2004 at 66, Ex. 10-4.[2]

b. Petitioner's parents may not have *expressly refused* to testify, but they expressed a pronounced reluctance to do so, which amounted to the same thing

Both parties present partially credible, partially compromised versions of the critical conversations between Wager, Petitioner's parents and James Lund

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2. No objection was made to the admission of Boyle's statements as reflected in the exhibits.

during the trip to court on the morning of July 27, 1997. Petitioner's mother, father and Mr. Lund all used precisely the same terminology in stating that the parents never "refused" to testify on Petitioner's behalf. Such terminology appears to have been carefully crafted and synchronized for use in written declarations. While it therefore may be accurate in a precise, semantic sense to say that the parents never *refused* to testify, the Court finds that the parents at least expressed clear *reluctance* to testify, which, in context, conveyed the same sense as a refusal. Hence, when Respondent's attorney asked Amalia Mirzayance on cross-examination whether she ever expressed any such "reluctance" during the trip to court, Mrs. Mirzayance gave a two-part answer, the second part of which stands rather at odds with the first. "Never. Never," she began – but immediately added, unprompted and rather defensively, "And he [Wager] always said he would prepare us." The fact that Mrs. Mirzayance added the second response when, and how, she did, suggests strongly that she indeed had expressed some resistence – based on a sense of unpreparedness – to testifying, and that, today, she still believes that she and Samuel Mirzayance were inadquately prepared for their NGI-phase testimony. In turn, Wager understood Mrs. Mirzayance's immediate reply, asserting her sense of unpreparedness and her resentment that Wager was at fault therefor, as an expression of her unwillingness to testify at all, for (according to her) Wager responded by recommending abandonment of the NGI defense as hopeless. (On the other hand, Wager testified that he does not remember what preceded the parents' refusal to testify – a refusal that he says Samuel, not Amalia, announced, and which was explicit – "We're not going to testify" – rather than implicitly couched in terms of unpreparedness.) In sum,

both parties' witnesses appear to have shaded what the Court finds to be the truth about whether a "refusal" to testify occurred. Wager did so by testifying that Petitioner's parents announced an *express* refusal, and Petitioner's mother did so by failing to acknowledge that she effectively *had* refused by expressing strong reluctance based on Wager's alleged failure to prepare her and Samuel Mirzayance.

Corroborating the Court's finding that Petitioner's parents indicated a strong disinclination to testify at the NGI phase are the facts that (1) they did not testify later at his sentencing hearing, and (2) the reason for their choosing not to do so, according to Mrs. Mirzayance, is that they would not have been able to speak, or to speak well, because the occasion would have been "too emotional" for them. EHT Jan. 27, 2004 at 176. If weeks after the guilty verdict and the withdrawal of their son's NGI plea, Petitioner's parents' emotions still prevented them from testifying at the sentencing hearing, then surely those emotional obstacles to their testifying *in the NGI phase* would have been at least as potent, and probably more so. (If so, Wager made an accurate assessment about the capability of eliciting an emotional reaction, were they to testify.)

James Lund's testimony about the phone call that followed the parents' effective refusal largely favors Petitioner's version of events, but the Court views it with some skepticism. As with the parents' testimony, Lund's account clashes so strongly with Wager's that it is difficult to conclude that the cause is merely a difference among the witnesses' memories and perceptions. In his declaration, Lund said that Wager began by telling him that the parents were "in too much pain to testify" and that, partly for that reason, he (Wager) was going to withdraw the NGI plea. Lund's

notes, written shortly after the call, corroborate that statement. Assuming that this part of Lund's account is true, it is quite plausible that Lund would say *some* of what he testified he next said, such as asking Wager whether it would not be better to put on the defense without the parents' testimony.

But it is troubling that Lund did not *also* immediately say something to Wager more along the lines of, "What? What do you mean, they're 'in too much pain to testify'? This is Alex's life we're talking about here! Put them on the phone now, so that I can try to get them to testify." Instead, Lund apparently took Wager's news, which should have been shocking indeed, with aplomb – and thus neither asked the parents if Wager's "too much pain to testify" statement was true nor sought to persuade the parents to testify. (It is Petitioner's position today that the parents never refused, or expressed any reluctance, to testify at the NGI phase. Thus, if Lund instead *had* asked them about Wager's "too much pain" statement, presumably, in Petitioner's version of events, the parents would have answered such a question from Lund by saying something like, "No, we're in pain, Jim, but certainly not so much that we want not to testify. Where did Don get that idea?") Lund does say that neither parent "*told me that* they refused to testify," but then, Lund apparently did not *ask* them whether they refused. (Emphasis added.)

One possible explanation for why both Lund and Petitioner' parents appeared to be "on the same page" by the time of the cell-phone call that morning, and why Lund reacted calmly to news that shocked Wager (and which Wager believed should have shocked Lund as well), is that Lund already had spoken with Samuel Mirzayance by telephone the preceding evening, several

hours after the jury convicted Petitioner of first-degree murder. Lund's notes about his discussion with Samuel Mirzayance reflect that Lund himself called Samuel Mirzayance and, when Mr. Mirzayance returned his call, they discussed the guilt-phase verdict and that Samuel was "disconsolate." The notes provide no other record of what was said that night. This brevity contrasts remarkably with the extraordinary detail with which Lund otherwise approached not only his note-taking – as illustrated by the nineteen lines of notes he made about the short but critical cell-phone call the following morning – but also to his minute, task-by-task, contemporaneous "policing" of Wager's lawyering throughout the case. *See, e.g.*, Lund Decl. (Ex. 9) at internal exs. B (several documents, including detailed meeting agenda outlining anticipated procedural steps in the case, with Lund's handwritten notes and a legal memorandum on insanity defense appended; and "litigation work schedule" specifying, week by week, numerous tasks to be done in that week) and C (handwritten pre-meeting notes allegedly listing "the pre-trial tasks which Mr. Wager had assured would be accomplished prior to trial, but which reportedly had not been done"). Together with Lund, Petitioner's parents may well have decided on the night before the trip to court with Wager that they would tell Wager of their serious reluctance to testify on Petitioner's behalf.[3]

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3. Petitioner's parents repeatedly stated their view of Wager as singularly in charge of their son's defense, as "the captain" whose directives they followed even if they did not always fully understand or agree with him. *See* EHT Jan. 28, 2004 at 108 (Samuel Mirzyayance testimony). But the record suggests that James Lund was not far behind the scenes. Wager's co-counsel Larry Boyle apparently referred to him as "the client" and he

(continued...)

The Court finds Wager's account of the Lund phone call to be more credible, although it is not without weakness. Wager testified on direct that he expressly beseeched Lund, "Jim, you've got to convince them to testify," only to be told, calmly, "Can't you proceed without them?" But on cross-examination, Wager admitted that he had *not* asked Lund to use Lund's "best efforts right now" to get the parents to testify. The Court accepts this seeming inconsistency as Wager's conclusion that the parents' reluctance to testify was a "done deal," one that any beseeching on his part could not undo. *See* EHT Jan. 27, 2004 at 105-06 (Wager) ("I was angry then because of my impressions I got from what he said and how he said it as to what I thought had been occurring.").

c. Financial concerns did not affect Wager's decision

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3. (...continued)
oversaw numerous details in the case, including every action and perceived omission by Wager. *Compare* Eric Lund Decl. (Ex. 10) at its internal ex. A (memo to file and James Lund, recounting co-counsel Larry Boyle's statement that "*JLL* [James Lund] *wanted* there to be one captain and Wager was it," (emphasis added) *with id.* ¶ 5(a) (similar, but recounting that Boyle had said that "*the client*" wanted Wager to be the sole captain) (emphasis added); *see also* James Lund Decl. (Ex. 9) at internal exs. B (several documents, including detailed meeting agenda outlining anticipated procedural steps in the case, with Lund's handwritten notes and a legal memorandum on insanity defense appended; and "litigation work schedule" specifying, week by week, numerous tasks to be done in that week) and C (handwritten pre-meeting notes allegedly listing "the pre-trial tasks which Mr. Wager had assured would be accomplished prior to trial, but which reportedly had not been done").

Finally, the Court rejects Petitioner's implication that Wager advised Petitioner to withdraw the NGI defense because Wager believed that Petitioner's parents owed him additional funds. Wager testified that, as of the time of that decision, Petitioner's parents had not made any payments since May 1997, but their "pattern of payments" throughout the course of his representation had included such gaps in the past. Accordingly, Wager testified, "the fact that [Samuel Mirzayance] hadn't paid in May didn't really affect me [at the time of the NGI-withdrawal decision]. EHT Jan. 27, 2004 at 130-31. Indeed, it was not until after Petitioner's trial ended that Wager first learned he would not be receiving any further payments and, thus, considered suing Petitioner's parents for such payments. *Id.* at 131. No witness testified that anything about financial considerations was mentioned during the car ride to court on Friday morning. Petitioner's counsel candidly conceded at closing argument that he could point to no evidence showing that Wager believed *in late June 1997* that Petitioner's parents would not be paying him any more money. *See* EHT Jan. 30, 2004 at 21-23.

III.

STANDARD OF REVIEW

A fork lies in this Court's road to a decision on the claim currently before the Court. The split starts with the Court's selection of the proper standard of review to apply to the California courts' unexplicated denial of the claim.

A. Deferential Review Under AEDPA?

The first of two possibly applicable standards is the deferential standard dictated by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). 28 U.S.C. § 2254(d). This action was filed after the effective date of the AEDPA. Under the AEDPA standard, federal courts "shall not" grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings[,] unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]"[4/] *Id.* Ineffective-assistance-of-counsel claims fall under the AEDPA rule. *See Yarborough v. Gentry*, 540 U.S. 1, ___, 124 S. Ct 1, 4 (2003) ("If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief" only if state courts' rejection fails either "contrary to" or objectively "unreasonable application" prong of AEDPA). Here, Petitioner presented his claim in state habeas petitions to the California Court of Appeal and California Supreme Court, and both courts denied the claim without explanation or citation, an act that constitutes an on-the-merits adjudication. *See Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); Exs. D (initial state-habeas petition and brief) at D314, D406 (internal ¶ III.F of both petition and brief), F & G (Court of Appeal

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4. A second prong of 28 U.S.C. § 2254(d) also permits habeas relief when the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Petitioner's theory on habeas, however, is not that the California courts' decision derived from inaccurate factual findings based on the record before them, but that the record was incomplete.

opinion, and modification thereof, denying relief without explaining basis for rejection of claim now on remand), L (state supreme court habeas petition and brief) at L590-91, L655-67, L682 (internal ¶¶ III.D & III.F).

The usual AEDPA standard of review for claims thus "silently denied" is not *de novo*. Rather, the district court reviews the record independently to determine whether, in light of that review, the state courts' rejection was "objectively unreasonable," as that phrase is used in *Williams v. Taylor*, 529 U.S. 362 (2000). *See Himes v. Thompson*, 336 F.3d 848, 853 n.3 (9th Cir. 2003) ("As we cannot attribute reason to a silent opinion, we have no source other than the record upon which to base our analysis."); *compare Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2002) (*following Williams* and requiring independent review of the record for federal habeas claims rejected without explanation in state court, but applying "clear error" test as whether state-court denial was "objectively unreasonable) *with Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) ("The [Ninth Circuit's] gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness.") (*citing Williams and Bell v. Cone*, 535 U.S. 685, 699 (2002)) (*repudiating in part Van Tran v. Lindsey*, 212 F.3d 1143, 1152-54 (9th Cir. 1999)).

Prior to the AEDPA, the lower federal courts could rely on their own decisions when granting habeas relief, even if those decisions went beyond the determinations of the Supreme Court itself. The AEDPA, however, expressly restricts federal habeas relief to claims in which the state-court adjudication violated "clearly established federal law, as determined by the Supreme Court" itself. As the high court explained in *Williams*, *supra*,

> [i]f this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar. In this respect, we agree with the Seventh Circuit that this clause "extends the [anti-retroactive relief] principle of *Teague* [*v. Lane*, 489 U.S. 288 (1989),] by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ." *Lindh v. Murphy*, 96 F.3d 856, 869 (1996). As that court explained:
>
> > This is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court. The novelty of this portion of § 2254(d)(1) is not the "contrary to" part but the reference to "Federal law, as *determined by the Supreme Court of the United States*" (emphasis added). . . . It does not, however, purport to limit the federal courts' independent interpretive authority with respect to federal questions.

Williams, 529 U.S. at 381-82 (analogizing AEDPA's concept of "clearly established Federal law" to the sort of well-settled Supreme Court doctrine discussed in *Teague v. Lane*, *supra*, 489 U.S. 288 (1989). *Williams*, 529 U.S. at 379-84. "In other words," the high court explained more recently in *Andrade*, *supra*, "'clearly established federal law' under § 2254(d)(1) is the governing legal principle or principles *set forth by the Supreme Court* at the time the state court renders its decision." 538 U.S. at 71 (emphasis added) (noting that "in most situations" determining such law will be

"straightforward," but in some settings, such as the Eighth Amendment's limitations on lengthy prison sentences for recidivists, the Supreme Court's precedents will not present "a model of clarity"). "Thus," the Ninth Circuit recently explained, "[w]hile circuit law may be 'persuasive authority' for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court's holdings are binding on the state courts, and only those holdings need be reasonably applied." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003) (internal citations omitted).

Complicating any such deferential review of Petitioner's claim here is the fact that, after the state courts completed their denials of that claim, additional evidence has been adduced at an evidentiary hearing. The state courts' rulings derived from a record that did not include that evidence. How, then, may this Court assess whether the state courts' rejection of the claim constituted an "unreasonable application" of Supreme Court authority? One possibility is to assess whether the State courts' *decision* constituted an objectively unreasonable application of high court doctrine in light of the record as augmented by this Court's evidentiary hearing.

B. Or, *De Novo* Review, Because Court Now Considers New Evidence?

Although, because the state courts decided Petitioner's claim on the merits, the text of the AEDPA appears to permit habeas relief on Petitioner's claim only if the state court's denial of relief constitutes an "objectively unreasonable" application of Supreme Court holdings, the Ninth Circuit and other Courts of

Appeals have held, expressly or implicitly, that *de novo* review instead applies due to the addition of new evidence not considered by the state courts. *See Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002) ("AEDPA deference does not apply to Killian's perjury claim because the state courts could not have made a *proper* determination on the merits. Evidence of the perjury, after all, was adduced only at the hearing before the magistrate judge.") (emphasis added); *see also Monroe v. Angelone*, 323 F.3d 286, 297-98 (4th Cir. 2003) (rejecting AEDPA deference for claim grounded on evidence first admitted into the record during federal habeas proceedings) (*citing Killian* and other cases). Although it may make theoretical sense to dispense with deferential review for claims augmented, for the first time in federal district court, with factual support not considered by the state courts, nevertheless neither *Killian* nor *Monroe* addresses the tension between such an approach and the provisions of the AEDPA.

If *Killian* applies and requires *de novo* review, then this Court's analysis will differ from a deferential AEDPA analysis in two critical ways:

1. The Court must grant relief if Petitioner shows that the state-court rejection of his claim was wrong. Petitioner need not demonstrate that the state court's rejection of his claim was not only wrong but went beyond "clear error" and resulted from an "objectively unreasonable" application of Supreme Court authority, and
2. As its substantive basis for deciding the claim, this Court must consider not only Supreme Court holdings (which are the only permissible referents under the AEDPA) but also decisions of the courts of appeals.

IV.

APPLICABLE SUBSTANTIVE LAW: *STRICKLAND* AND BEYOND

As noted immediately above, the breadth of substantive law bearing on Petitioner's claim depends directly on the chosen standard of review. If that standard is a deferential one under the AEDPA (albeit one requiring an independent review of the record, because the state courts' denial of the claim was unexplained), then the only proper basis for granting relief is a deviation from, or misapplication of, the decisional law of the Supreme Court. But if the AEDPA standard of review does not apply, then decisions by inferior courts also may be the basis for habeas relief, even if those decisions extend the holdings of the Supreme Court. In this section, the Court first summarizes the Supreme Court cases that appear to apply to Petitioner's ineffective assistance of counsel claim, then turns to Courts of Appeals decisions on the same subject.

A. Supreme Court Decisions: *Strickland*, *Gentry* and *Hill*

To establish a claim of ineffective assistance of counsel, Petitioner must demonstrate not only that his trial counsel's performance was deficient but also that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Petitioner bears the burden of establishing both components of the *Strickland* standard. *Strickland*, 466 U.S. at 687. As noted briefly above, habeas claims of ineffective

assistance of counsel are subject to deferential review under the AEDPA. *Gentry*, *supra*, 540 U.S. 1, ___, 124 S. Ct. 1, 4 (2003).

1. Part 1 of *Strickland*: deficient attorney performance

Under *Strickland*, an attorney's performance is "deficient" if his or her errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* 466 U.S. at 687. A defendant is not entitled to perfect lawyering but only to "reasonably effective assistance." *Id.* In reviewing trial counsel's performance, the court will "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Only if counsel's acts or omissions, examined within the context of all the surrounding circumstances, fell outside the "wide range" of professionally competent assistance, will the petitioner meet this initial burden. *Strickland*, 466 U.S. at 690.

2. Part 2 of *Strickland*, and *Hill v. Lockhart*: resulting prejudice

An attorney's deficient performance still may not *harm* the defendant. Thus, satisfying the second, "prejudice" portion of *Strickland* requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Williams*, *supra*, 529 U.S. at 391. A "reasonable probability," the Supreme Court has explained, is one "sufficient to undermine confidence in the outcome." *Id.*

Petitioner seeks to compare his withdrawal of his NGI plea, based on the allegedly deficient advice of Wager, to cases in which a defendant withdrew his *guilty* plea based on an attorney's deficient advice. The most prominent example is *Hill v. Lockhart*, 474 U.S. 52 (1985). *Hill* held, first, "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas." "[I]n order to satisfy the 'prejudice' requirement" of that test, the *Hill* Court explained,

> the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

474 U.S. at 59 (footnote omitted). *Hill* next explained that the proper method of ascertaining whether such a "reasonable probability" exists will vary greatly from case to case, depending on the particular manner in which the attorney allegedly failed the petitioner:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, when the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether

> the evidence likely would have changed the outcome of the trial. [¶]
>
> Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend on whether the affirmative defense likely would have succeeded at trial. *See, e.g., Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984) ("It is inconceivable to us . . . that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland v. Washington*, *supra*, these predictions of the outcome of a possible trial, where necessary, should be made objectively, without regard for the "idiosyncracies of the particular decisionmaker."

474 U.S. at 59-60.

Petitioner argues that *Hill* controls and "requires only a showing of reasonable probability that the defendant would not have . . . withdrawn his insanity plea[5] but for the ineffective assistance." Pet'r's Reply

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5. In full, Petitioner states that he need only show a reasonable probability that he "would not have *pled guilty / withdraw his insanity plea* but for the ineffective assistance." Pet'r's Reply Br. at 18 (emphasis added). As discussed further below, the Court rejects Petitioner's attempt – via creative use of a slash ("/") – to equate, or conflate, (1) *the entering of a plea of guilty* based on poor legal advice, as occurred in *Hill*, with (2) *the* (continued...)

Br. at 18. Petitioner cites no Supreme Court decision that has extended *Hill* which involved the withdrawal of a *guilty* plea, to the present *NGI*-plea-withdrawal setting, but he argues that the two situations nevertheless are "strong[ly] analog[ous]." "Just as there can be no conviction without a plea or guilt[y] verdict, there can be no resolution of a criminal case with an NGI plea outstanding." *Id.* Precisely how such a reading of *Hill* would impact this case is unclear, but Petitioner plainly believes it requires a finding of prejudice in this instance without regard for the evidence adduced about the weaknesses and strengths in the NGI phase as it would have occurred.

The Court disagrees that *Hill* eliminates any need to consider how the NGI phase would have proceeded (if, that is, the Court first concludes that Wager's performance was deficient). *Hill*'s holding concerned the withdrawal of a *guilty* plea based on poor lawyering. No Supreme Court or other authority reviewed by this Court has extended *Hill* to a withdrawal of an *insanity* plea. (Another Supreme Court case Petitioner cites, *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), is similarly inapposite, for the petitioner's claim in that case – that his lawyer's ineptitude caused him to fail to file an appeal of his conviction – was that he had unfairly lost his chance to contest his guilt *per se*.) A California defendant's plea of NGI does not directly gainsay his alleged guilt, but rather invokes a partial affirmative defense. Unlike guilt, which the state must prove beyond reasonable doubt, insanity must be proven, by the defendant, by a preponderance of the evidence. *See*

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5. (...continued)
withdrawal of a partial affirmative defense, such as insanity, also based on poor legal advice.

CAL. PENAL CODE § 25(b); *People v. Hernandez*, 22 Cal. 4th 512, 522, 93 Cal. Rptr. 2d 509, 515 (2000) ("Sanity proceedings do not constitute an *action*. Insanity is a plea raising an *affirmative defense* to a criminal charge, [albeit] one that does not negative an element of the offense.") (emphasis in original).

Once the NGI plea is properly viewed as invoking an affirmative defense, rather than as challenging the prosecution's case in chief, the specific teaching of *Hill* in this setting becomes clearer. Although it did not specifically mention insanity pleas, *Hill* did instruct lower courts that "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend on whether the affirmative defense likely would have succeeded at trial." That language applies here, for Petitioner's position is that Wager's deficient advice robbed him of his opportunity to present an affirmative defense, insanity. Accordingly, if the Court should conclude under the first *Strickland* test that Wager's conduct was deficient, its test for prejudice will be as follows: based on the evidence of how the NGI phase of Petitioner's trial *would have proceeded*, is there a reasonable probability that Petitioner would have obtained a verdict sustaining his NGI plea, had he not withdrawn that plea on Wager's advice?

B. Court of Appeals Decisions Applying, Or Perhaps Extending, *Strickland*

The Court next summarizes Court of Appeals decisions involving claims similar to Petitioner's (although the Court has reviewed no cases "on all fours" with Petitioner's claim).

1. Generally, counsel need not present every non-frivolous defense

A general rule framed by the Court of Appeals decisions is that an attorney does not perform deficiently under *Strickland* for failing to advance every possible defense when the attorney reasonably does not believe the client's interests would thereby be advanced. *See Iaea v. Sunn*, 800 F.2d 861, 865 n.4 (9th Cir. 1986) (*citing Tollet v. Henderson*, 411 U.S. 256, 267-68 (1973)); *Evans v. Meyer*, 742 F.2d 371, 374 (7th Cir. 1984) (lawyer need not advise client of "every defense or argument or tactic that while theoretically possible is hopeless as a practical matter"); *cf. United States v. Cronic*, 466 U.S. 648, 656-57 n.19 (1984) ("If there is no *bona fide* defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."). After all, "[t]here are countless ways to provide effective assistance of counsel in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 669. The law thus protects an attorney's informed choices between two or more potentially beneficial courses of conduct. The fact that an attorney's forgone action *might* have helped the defense does not overcome the presumption of competence, if the attorney's course "might be considered a sound trial strategy," *id.* – that is, if it reasonably could have benefitted the defense in some way. *See Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987).

In an application of this rule that relates to the present petition, and one cited prominently by Respondent, the Ninth Circuit has held that –

> even where there is a strong basis for a mental defense, an attorney may forego that defense where the attorney's experts would be subject to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion. *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990). . . .

Hendricks v. Calderon, 70 F.3d 1032, 1037 (9th Cir. 1995). But part of the reason why the choice to forgo a mental defense in both *Hendricks* and *Harris* was not deficient is that, in both cases, the petitioner's attorney had *other*, competing defenses or theories to advance and was reasonably concerned that a weak mental defense would detract from those other, preferred theories. As the Ninth Circuit explained in *Hendricks*:

> The choice to pursue a particular strategy in one phase [of trial] at the cost of lowering the likelihood of success in another phase is a tactical decision for which there is no correct answer, but only second guesses.

Id. at 1041. Thus, an attorney's informed decision to forgo a mental defense, particularly one lacking strong evidentiary support, in favor of other potentially beneficial defenses or theories, generally will not be "second-guessed" as deficient, even if the gambit fails. *See Williams v. Woodford*, 306 F.3d 665, 709 (9th Cir. 2002) (counsel not deficient for declining to mount weakly-supported mental defense that would have conflicted with alibi theory); *Harris*, *supra*, 949 F.2d at 1525 (counsel not deficient for declining to mount mental defense that not only lacked strong expert support but also would have conflicted with defendant's

alibi and mitigation strategies).

2. The "nothing to lose" concept

According to a few Court of Appeals cases, if an attorney chooses to do nothing and thereby forgoes a client's fully-prepared, non-frivolous *sole* defense – a defense with at least a reasonable chance of succeeding – without obtaining *any* chance of bettering his client's trial outcome, that attorney's action is "deficient" under the first prong of *Strickland*.

For example, in a key Fifth Circuit decision cited by the Ninth Circuit in its remand opinion, *Profitt*, *supra*, the petitioner's counsel at his Texas state-court trial was aware that his client recently had escaped from an Idaho asylum, but counsel failed to check readily-available public records showing that the petitioner also had been adjudicated legally insane by an Idaho court. Under Texas law, evidence of that Idaho adjudication would have shifted the burden of proof on the petitioner's insanity defense from the petitioner to the state, requiring the prosecution to prove sanity beyond a reasonable doubt. But because the petitioner's attorney failed to learn of the Idaho ruling and its significant potential benefit to his client, he forwent the insanity defense altogether, even though it was his client's only defense. The Fifth Circuit held that such a failure to investigate rendered counsel's performance inadequate – a conclusion bolstered by not only (1) the attorney's admission, at an evidentiary hearing, that he was not even aware that the Idaho judgment would have shifted his client's burden of proof in the Texas sanity defense, but also (2) the substantial prejudice that likely resulted from the neglect. (This latter point illustrates a dynamic that the parties here do not expressly

identify, namely that the outcome of the *first Strickland* prong, deficiency of performance, can relate strongly to the second, prejudice. In circumstances like those presented here, the greater the likelihood of prejudice flowing from an attorney's decision, the greater the likelihood that the attorney's decision also constituted deficient performance.)

The *Profitt* panel rejected the state's assertion that the petitioner's trial lawyer "made an informed and conscious decision on trial tactics in deciding not to pursue the insanity defense." Instead, the lawyer committed neglect that *deprived* the petitioner and the lawyer of any ability to make such a choice. In language quoted by the Ninth Circuit in the present case, *Profitt* explained that, instead of making "true tactical choices" that merit deference "– that is to say, . . . choices between alternatives that each have the potential for both benefit and loss" – Profitt's attorney had given up a potentially beneficial course in favor of a course that had no possibility of helping Profitt. Such a "nothing to gain" decision did not merit deference against "second guessing" and, the Fifth Circuit held, was deficient under the first part of *Strickland*.

The few other Courts of Appeals encountering this rare situation have agreed with *Profitt*. In *United States ex rel. Barnard v. Lane*, 819 F.2d 798 (7th Cir. 1987), the petitioner was convicted of first degree murder after his trial attorney declined – in an "all or nothing" gambit – to seek jury instructions for justification or manslaughter. Circuit Judge Harlington Wood wrote that it was not a proper tactical choice – one deserving deference under *Strickland* – for the attorney thus to seek jury nullification:

> Far from being a mere tactical choice, trial

> counsel's decision . . . , in the face of the jury's clear reluctance to find Barnard guilty of murder, was a prejudicial error which forced the jury to convict Barnard. . . . [G]iven Barnard's testimony and the instructions they were bound to follow, [the jury] could hardly do less than find Barnard guilty of murder. *The spectrum of counsel's legitimate tactical choices does not include abandoning a client's only defense* in the hope that a jury's sympathy will cause them to misapply or ignore the law they have sworn to follow .

Id. at 804-05 (emphasis added).

Finally, in *Epsom v. Hall*, 330 F.3d 49 (1st Cir. 2003), the petitioner asserted that his lawyer was ineffective for failing to call the *only* witness whose testimony could have supported an instruction on self-defense. "In his brief," the *Epsom* majority explained,

> [Epsom's] habeas counsel argued thus:
>
> > The basketball player with the ball, who decides that he can't pass because no one's really open, that he can't dribble because the defender knows he only goes right, and that he can't shoot because he's out of his best range, guarantees that his team will not score. The trial attorney here made the same outcome-determinative series of calculations.
>
> Often, a weak witness or argument is not merely useless but, worse than that, may detract from the strength of the case by distracting from stronger arguments and focusing attention on weaknesses. [Citations.] But we accept counsel's assertion on this appeal that weak witnesses in an otherwise

> hopeless case are better than none. For this reason, in such a case the failure to call weak witnesses cannot be justified merely by pointing to the potential weaknesses of each individual witness.

Id. at 53 (*dicta*). The First Circuit's acceptance of such a rule technically is *dictum*, for *Epsom* went on to decide not only that Albert Epsom's case was *not* the sort of "otherwise-hopeless case" hypothesized in the rule, but also to reject habeas relief for that reason.

Respondent adverts to *Lowry v. Lewis*, 21 F.3d 344 (9th Cir. 1994), as support for the proposition that the Ninth Circuit has rejected the "nothing to lose concept." *Lowry* did so, but its holding on this point was interrelated with the context in which the ineffectiveness claim arose. Petitioner there asserted his counsel was ineffective for failing to make a suppression motion in a criminal case. In that context, the court of appeals noted that an attorney must guard his credibility and do his part to conserve judicial resources, and both may be jeopardized by the making of such a preliminary motion as to which it otherwise might be said that the attorney has nothing left to lose. *Id.*, 21 F.3d at 346. *Lowry* does not govern the present case, and the Ninth Circuit has not applied the "nothing to lose" concept to the context of a withdrawal of a NGI plea following a guilt phase determination.

V.

APPLICATION OF THE LAW OF THE CASE DOCTRINE (THE "MANDATE RULE") REQUIRES THE COURT TO SUSTAIN PETITIONER'S CLAIM

Under the law of the case doctrine and "the mandate rule," the Ninth Circuit's opinion remanding Petitioner's claim effectively decides for *this* Court which legal path it must choose at the above-described fork in the doctrinal road. That path leads to a grant of Petitioner's remanded claim.

A. The Law Of The Case Doctrine And The "Mandate Rule"

"The law of the case doctrine provides that 'the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case.'" *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 849 (9th Cir. 2004) (quoting *Bernhardt v. Los Angeles County*, 339 F.3d 920, 924 (9th Cir. 2003) (citation omitted)). A prior ruling need not be expressly made, or discussed in any detail, to serve as the law of the case; decisions that are implicit, or terse, will suffice. *See id.* (matters "decided by necessary implication" included); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392-93 (9th Cir. 1995). A district court's failure to follow the law of the case, as established by a ruling of its supervising Court of Appeals, constitutes an abuse of discretion unless one of the following "three recognized exceptions" applies:

> (1) the earlier decision is clearly erroneous[,] [or] its enforcement would work a manifest injustice; (2) intervening controlling authority makes reconsideration appropriate; or (3) substantially different evidence was adduced at a subsequent trial.

Bronster, 363 F.3d at 349 (following *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996)); *see id* n.1 (noting, as to first listed exception, that the Ninth Circuit has sometimes required *either* "clear error" *or* "injustice," and at other times has required both elements). Here, neither of the first two exceptions applies. As to the third: new and "different evidence" certainly bas been adduced since the Ninth Circuit's remand, but the injection of that new evidence logically cannot support an exception to the law of the case doctrine as to previously-decided questions that are purely legal, such as the choice of a standard of review, rather than a mixed question of law and fact.

Related to the law of the case doctrine is the "mandate rule," whereby an inferior court must obey the mandate of its supervising appellate court. *See Insurance Group Comm. v. Denver & Rio Grande Western R.R. Co.*, 329 U.S. 607, 612 (1947) ("When matters are decided by an appellate court, its rulings, unless reversed by it or by a superior court, bind the lower court."). Put differently, "district courts are not free to decide issues on remand that were previously decided either expressly or by necessary implication on appeal." *Mirchandani v. United States*, 836 F.2d 1223, 1225 (9th Cir. 1988) (*citing Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982), *and Stephens v. F/V Bonny Doon*, 731 F.2d 1433, 1435 (9th Cir. 1984)). Lower courts' adherence to the mandate rule is absolutely "necessary to the operation of a hierarchical judicial system." *Id.*, *citing* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4478 (1981).

B. The Law Of *This* Case, As Stated In Ninth Circuit's Mandate Opinion

Absent any constraints arising from the law of the case doctrine, this Court would face a difficult choice between two competing standards of review for Petitioner's claim, *i.e.*, between AEDPA review and *de novo* review. In turn, that choice directly controls the scope of applicable substantive law, *i.e.*, whether the state courts' rejection of the claim is to be tested only against *Supreme Court* decisions or whether authority from inferior federal courts also may serve as grounds for habeas relief. Were it writing on such a blank slate, this Court might conclude that –

(1) deferential review applies under the AEDPA, because the remanded claim "was adjudicated on the merits in State court proceedings," even though those proceedings did not include the current evidentiary record;

(2) Wager's considered decision to advise Petitioner to withdraw the NGI plea, under the circumstances discussed at length above, was not deficient so as to have deprived Petitioner of the counsel guaranteed by the Sixth Amendment, and hence did not constitute "deficient performance" under "clearly established Federal law, as decided by the Supreme Court" in *Strickland* – a case which may not clearly hold, as some Courts of Appeals have foreshadowed, that a "nothing to lose" rule sometimes applies to ineffectiveness claims;

(3) thus, absent deficient performance, *Hill* and the prejudice prong of *Strickland* are immaterial;

(4) therefore, the California courts' unexplained rejection of Petitioner's claim did not result from an objectively unreasonable application of Supreme Court precedent, even if this Court supposes that the state courts were ruling on the

current, expanded evidentiary record;

(5) alternatively, even if *de novo* review applied as indicated in *Killian v. Poole*, *supra*, 282 F.3d at 1208, Wager's decision still would not constitute ineffective assistance of counsel; and

(6) the petition should be denied as to the remanded claim.

But the Ninth Circuit's mandate clearly establishes law of the case that instead requires a more favorable result for Petitioner. The appellate panel quite clearly concluded that the proper test for assessing the ineffectiveness claim here was that stated by the Fifth Circuit in *Profitt v. Waldron*, *supra*, 831 F.2d at 1249:

> we cannot baptize the decision to forego the insanity defense with the rejuvenating labels of "tactical" or "strategic" choice. Judges wisely defer to true tactical choices – that is to say, to choices between alternatives that each have the potential for both benefit and loss . . . . [But] we simply can see *no advantage* in the decision to bypass the insanity defense.

Mirzayance, 2003 WL 21085225 at **2 (quoting *Profitt*, 831 F.2d at 1249 (emphasis in original)). After noting that "there was a cadre of experts ready to testify that Mirzayance was insane," the Ninth Circuit concluded its discussion of the remanded claim as follows:

> An evidentiary hearing will assist in determining if [on the one hand] there were tactical reasons for abandoning the insanity defense or if [on the other hand] the withdrawal of the defense was a wholesale abandonment of the one viable and strong

defense Mirzayance had.

Id. at **3.

The remand opinion mandates that the applicable *substantive* law by which this Court must judge the remanded claim is the "nothing to lose" rule pronounced in *Profitt*. The Ninth Circuit held that it was an abuse of discretion not to have held an evidentiary hearing, because such a hearing would determine whether, in fact, Petitioner had nothing to lose. If "nothing to lose" were not the applicable standard in the context of this case, then it would not have been an abuse of discretion to rely on the record before the State court. Thus, the function of the evidentiary hearing was to determine whether, in fact, Petitioner had nothing to lose.

Furthermore, implicit in the mandate, and required by *Killian*, *supra*, 282 F.3d at 1208, this Court must review the ineffectiveness claim *de novo*. If Petitioner had nothing to lose under *Profitt* – whether *Profitt* merely applies *Strickland*, or in fact extends it – the command of the Ninth Circuit is that *therefore* Petitioner is entitled to relief. And the Ninth Circuit's description of the NGI defense, as remaining "viable and strong," plainly indicates the appellate court's conclusion, under the prejudice prong of *Strickland*, that there is a "reasonable probability" that Petitioner would have obtained a better trial outcome had that defense been presented. Indeed, if in fact there is "nothing to lose" by presenting such a defense, prejudice is apparent so long as the NGI defense is not frivolous.

Under *de novo* review, and tested against the substantive law of *Profitt* as the Ninth Circuit's mandate requires, Wager's decision could not have been a legitimate "tactical" one because it carried no prospect

of aiding Petitioner substantially. Wager testified that, under the circumstances, he thought there was no reasonable chance of a successful NGI verdict, EHT Jan. 27, 2004 at 147-50, but he also admitted that there was nothing that "Alex gained by waiving the N.G.I. trial[.]" *Id.* at 123. Already facing a guilty verdict, Petitioner in fact had nothing to lose by proceeding with his already-prepared NGI defense. Bound by those matters inherent in the Ninth Circuit's decision, this Court must find that Petitioner had nothing to lose, and therefore that Wager's performance was deficient. As witnesses could have testified credibly and therefore perhaps successfully – even though subject to potential strong cross-examination – prejudice is established, as the Court's confidence in the verdict therefore is undermined.

VI.

RECOMMENDATION

Implementing the mandate of the Court of Appeals, therefore, the undersigned RECOMMENDS that the District Court issue an Order: (1) approving and accepting this Report; and (2) directing that Judgment be entered granting the petition for writ of habeas corpus as to the single remanded claim, *i.e.*, that Petitioner's trial attorney provided ineffective assistance of counsel in recommending, and concurring in, the withdrawal of Petitioner's plea, and defense, of Not Guilty By Reason Of Insanity ("NGI") *if*, within one hundred and twenty (120) days from the date the Judgment becomes final, or 120 days after appellate proceedings have concluded, the state court does not grant Petitioner the opportunity to reinstate his NGI

plea, and to conduct a "sanity phase" of trial as to that defense.

DATED: September 1, 2004

/S/
RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

FILED
MAY 09 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDRE MIRZAYANCE, Petitioner - Appellant, v. RODNEY HICKMAN, Warden, Mule Creek State Prison, Respondent - Appellee.	No. 01-56839 D.C. No. CV-00-01388-DT MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted April 7, 2003
Pasadena, California

Before: BEEZER, FERNANDEZ, and PAEZ, Circuit Judges.

Alexandre Mirzayance appeals the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. We affirm in part, reverse in part, and remand

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

with instructions to hold an evidentiary hearing on the ineffective assistance of counsel claim for abandonment of the not guilty by reason of insanity ("insanity") defense.

Our review is de novo. Wade v. Terhune, 202 F.3d 1190, 1194 (9th Cir. 2000). The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, applies because the petition for a writ of habeas corpus was filed on February 9, 2000. See Patterson v. Stewart, 251 F.3d 1243, 1245 (9th Cir. 2001) (noting that AEDPA applies to petitions filed after April 24, 1996). Under AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A habeas petitioner alleging

ineffective assistance of counsel under § 2254(d)'s "unreasonable application" clause must show that "the state court applied Strickland to the facts of his case in an objectively unreasonable manner." Woodford v. Visciotti, 123 S. Ct. 357, 360 (2002) (citing Strickland v. Washington, 466 U.S. 668 (1984)). Strickland holds that counsel is ineffective if counsel's "acts or omissions were outside the wide range of professionally competent assistance" and there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 690, 694.

Mirzayance argues that the district court abused its discretion in not granting an evidentiary hearing on:

1) the ineffective assistance of counsel claim for abandonment of the insanity defense; and
2) the spectator misconduct claim.

Mirzayance additionally argues that counsel was ineffective for:

3) calling only one expert witness at the guilt stage to testify regarding Mirzayance's mental health;
4) failing to prepare the expert witness to testify regarding premeditation and deliberation;
5) failing to adequately investigate and introduce facts pertaining to Mirzayance's mental health, relationship with the victim, and substance abuse;
6) conceding Mirzayance's guilt of second degree murder;
7) failing to request jury instruction CALJIC 4.21;
8) failing to request jury instruction CALJIC 8.73; and

9) advising petitioner to abandon his insanity defense and concurring in the withdrawal of that defense.

I

Mirzayance argues that the district court abused its discretion in deciding the ineffective assistance of counsel claim for abandonment of the insanity defense without an evidentiary hearing. We agree. "A state habeas petitioner is entitled to an evidentiary hearing on a claim if he did not receive a full and fair evidentiary hearing in state court and if he alleges facts that, if proven, would entitle him to relief." Tapia v. Roe, 189 F.3d 1052, 1056 (9th Cir. 1999).[1] A district court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. Id.

Mirzayance did not receive an evidentiary hearing in state court and he alleges facts that, if proven, would entitle him to relief. The district court dismissed the ineffective assistance of counsel claim for abandonment of the insanity defense by citing to Weber v. Israel, 730 F.2d 499 (7th Cir. 1984). Weber involved the abandonment of an insanity defense, but there were tactical reasons for its abandonment. The counsel in Weber abandoned an insanity defense because the

---

1. There is no indication that Mirzayance was not diligent in trying to develop the factual basis of his claim in state court. Mirzayance stated in his federal habeas petition that he requested evidentiary hearings in state court, but that they were denied. See Williams v. Taylor, 529 U.S. 420, 432 (2000) ("Under the opening clause of [28 U.S.C.] § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.").

prosecution had two psychiatric reports stating that Weber was not suffering from a mental disease or defect at the time of the alleged crimes, one of which referred to Weber as "malingering," and defense counsel had no psychiatric reports to the contrary. Id. at 506-07. The decision to abandon the insanity defense in Weber also took place prior to the guilt phase. Id. at 505. Defense counsel thought that if the jury knew an insanity phase would follow, the jurors would not give the defendant as much deference on the merits. Id.

In Mirzayance's case, the insanity defense was withdrawn after the guilt phase and there was a cadre of experts ready to testify that Mirzayance was insane. Dr. Markham, Dr. Sharma, Dr. Vicary, and Dr. Blum were all prepared to testify that Mirzayance met the standard for legal insanity. See Profitt v. Waldron, 831 F.2d 1245, 1249 (5th Cir. 1987) ("[W]e cannot baptize the decision to forego the insanity defense with the rejuvenating labels of 'tactical' or 'strategic' choice. Judges wisely defer to true tactical choices – that is to say, to choices between alternatives that each have the potential for both benefit and loss. . . . we simply can see no advantage in the decision to bypass the insanity defense.") (emphasis in original); see also United States v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996) ("We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood of success, and a defense that he specifically stated he had every intention of presenting.").

The record presents conflicting reasons for the abandonment of the insanity defense. Defense counsel states that he decided to waive the insanity phase of the trial when Mirzayance's parents said they would not testify. Mirzayance's parents state that at no time did

they refuse to testify. Mirzayance's parents assert that defense counsel unilaterally decided that he could not win the insanity phase of the trial and recommended that it not go forward on the morning that the insanity trial was scheduled to begin.

Bennett Blum, one of the insanity experts, stated that defense counsel called the night before the insanity trial was scheduled to begin to inform him that defense counsel was going to withdraw the insanity plea because defense counsel did not think the insanity case could be won in light of the jury they had. This call took place before defense counsel conferred with Mirzayance.

Mirzayance states that defense counsel talked with him for five minutes on the morning the insanity defense was scheduled to go forward and told Mirzayance that the insanity defense should be withdrawn because, with a finding of first degree murder, the insanity phase of the trial could not be won. Mirzayance explains that he was shielded from the expert testimony relating to his own mental condition. Mirzayance asserts that he had no idea that four experts were prepared to opine that Mirzayance was legally insane when counsel recommended that Mirzayance withdraw his insanity defense.

Attorney Lund, an attorney who represents the Mirzayance family in the civil action between it and defense counsel, stated that defense counsel consulted him on the morning that the insanity defense was withdrawn. Lund explains that defense counsel recommended withdrawing the insanity defense because: 1) Mirzayance's parents were in too much pain to testify; 2) Dr. Markman assured defense counsel that Dr. Markham could arrange for Mirzayance to be placed in a safe psychiatric prison treatment facility; 3) defense counsel believed the trial judge was empathetic towards

the Mirzayance family and would instruct that Mirzayance be sent to a psychiatric prison; and 4) defense counsel wanted to avoid a finding that Mirzayance was sane. Dr. Markham denies stating that he could arrange for Mirzayance's placement in a psychiatric facility.

A large number of experts were subpoenaed and ready to testify to Mirzayance's insanity. Mirzayance lacked knowledge of the evidence regarding his own mental state. Defense counsel and those with whom defense counsel spoke gave conflicting statements about why defense counsel recommended the abandonment of the insanity defense on the morning it was scheduled to begin. Given these factors, the district court abused its discretion by not holding an evidentiary hearing on this ineffective assistance of counsel claim. An evidentiary hearing will assist in determining if there were tactical reasons for abandoning the insanity defense or if the withdrawal of the defense was a wholesale abandonment of the one viable and strong defense Mirzayance had. We remand to the district court for an evidentiary hearing on this claim.

II

The district court did not abuse its discretion in dismissing the spectator misconduct claim without an evidentiary hearing. Mirzayance cannot show that the spectator conduct was "so inherently prejudicial [that it] pose[d] an unacceptable threat to [the] defendant's right to a fair trial" and that there was "an unacceptable risk . . . of impermissible factors coming into play." Holbrook v. Flynn, 475 U.S. 560, 570, 572 (1986). This trial was not like a "mob" atmosphere. See Altemose Const. Co. & Energy Contracting Co. v. Nat'l Labor

Relations Bd., 514 F.2d 8, 12-13 (3d Cir. 1975) (finding a "mob atmosphere" where defendant was "jeered by a crowd of approximately 100 workers who had gathered at the entrance [to the building]"). Rather, the state trial court closely monitored and supervised spectator conduct. Nor was this proceeding akin to Norris v. Risley, 878 F.2d 1178, 1183 (9th Cir. 1989), where the wearing of "Woman Against Rape" buttons and the serving of refreshments by members of the Rape Task Force required an evidentiary hearing. The small yellow ribbons worn by a few spectators in this case did not threaten the integrity of the proceedings.

III

The district court correctly held that counsel was not ineffective in presenting only one expert to testify about Mirzayance's mental health at the guilt phase. The choice of what type of expert to use "is one of trial strategy and deserves a heavy measure of deference." Turner v. Calderon, 281 F.3d 851, 876 (9th Cir. 2002) (internal quotation marks omitted). Dr. Satz presented a full day of testimony about Mirzayance's mental health. Any additional testimony the other experts could have offered would have been limited to the kind offered by Dr. Satz. See Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) (holding it is not unreasonable for defense counsel to not present largely cumulative testimony). Additionally, it may have been sound trial strategy to present the mental health evidence through one expert in order to avoid creating inconsistencies among experts.

IV

Mirzayance argues that defense counsel provided ineffective assistance by failing to prepare Dr. Satz to testify at trial regarding premeditation and deliberation. However, testimony about the ultimate mental state at issue is not admissible under California law during the guilt phase of a trial. See Cal. Penal Code § 29. As the California Court of Appeal correctly noted, the trial court warned Dr. Satz, "you can talk about any testing you gave. You can give general impressions. You cannot testify, however, specifically as to whether [defendant] premeditated in this situation, or formed a specific intent in this situation." The failure to prepare Dr. Satz on these points cannot constitute ineffective assistance of counsel.

V

Mirzayance argues that defense counsel was ineffective for failing to investigate and present at trial facts pertaining to Mirzayance's mental health, relationship with the victim, and marijuana use.

1

Mirzayance argues that defense counsel was ineffective for failing to present additional mental health evidence in addition to Dr. Satz's testimony. However, it is not unreasonable to avoid presenting cumulative mental health testimony. See Babbitt, 151 F.3d at 1174.

2

Mirzayance argues that defense counsel should have

presented evidence of the amicable relationship Mirzayance had with the victim as shown through letters and photographs. However, the relationship evidence was not directly relevant as the letters and photographs were from 1992-1994, one to three years before the 1995 murder.

3

Mirzayance argues that defense counsel should have introduced additional evidence of Mirzayance's marijuana use. However, defense counsel's tactical decision regarding how to present the marijuana case requires deference. Defense counsel presented multiple statements regarding Mirzayance's marijuana use. Defense counsel introduced Mirzayance's statements to police that he killed because he "was on the drugs," as well as the statement that Mirzayance had smoked two hashish cigarettes shortly before the murder. Mirzayance's statement to a friend that he used marijuana to make the voices in his head go away as well as Dr. Satz's testimony that schizophrenics often use marijuana to self-medicate were also introduced.

VI

Mirzayance argues that counsel was ineffective in conceding to the jury that Mirzayance was guilty of second degree murder. Defense counsel conceded that Mirzayance was guilty of second degree murder and focused on arguing that the murder was caused by Mirzayance's mental defect such that premeditation and deliberation were not present to support a first degree murder verdict. Mirzayance now argues that defense counsel should have tried to obtain a voluntary

manslaughter verdict.

Given the voluntary confession from Mirzayance that he killed his cousin, and the weak evidence of provocation and imperfect self-defense, it was not objectively unreasonable for trial counsel to concede that a murder occurred, and to focus his efforts on showing that the murder was not premeditated. See People v. Lucas, 12 Cal. 4th 415, 447 (1995) (holding that in light of strong evidence that a homicide occurred, it is "entirely understandable that trial counsel . . . made no sweeping declarations of his client's innocence but instead adopted a more realistic approach . . . ." arguing that "intoxication negated the mental elements necessary for . . . premeditated murder") (internal quotation marks omitted).

Although it is possible to mount a defense for voluntary manslaughter based on either provocation, see People v. Berry, 18 Cal. 3d 509, 515 (1976), or imperfect self-defense, see In re Christian S., 7 Cal. 4th 768, 779 (1994), neither theory was supported by the evidence in this case. Manslaughter through provocation involves a killing during a heat of passion "as would naturally be aroused in the mind of an ordinary reasonable person under the given facts and circumstances . . . ." See Berry, 18 Cal. 3d at 515. In this case, it would have been difficult to argue that an "ordinary reasonable person" would have killed because his cousin accused him of being late and yelled at him. See People v. Marshall, 13 Cal. 4th 799, 849 (1996) (holding manslaughter instruction unnecessary when "relations between defendant and [the victim] . . . were generally smooth and harmonious").

Although Mirzayance stated that he killed the victim because she fought back, "No case has ever suggested . . . that such predictable conduct by a

resisting victim would constitute the kind of provocation sufficient to reduce a murder charge to voluntary manslaughter." People v. Jackson, 28 Cal. 3d 264, 306 (1980), overruled on other grounds by People v. Cromer, 24 Cal. 4th 889, 898 (2001).

Similarly, a theory of manslaughter through imperfect self-defense was weak. Under a theory of imperfect self-defense, if a defendant "actually but unreasonably believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and cannot be convicted of murder." Christian S., 7 Cal. 4th at 783. However, Mirzayance was not under any threat from the victim when he began stabbing her. Two of the stab wounds were fatal. Counsel was not ineffective for choosing not to argue for voluntary manslaughter.

VII

Mirzayance argues that counsel was ineffective for failing to request a modified instruction of CALJIC 4.21. CALJIC 4.21 reads, in pertinent part,

> If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required [specific intent] [mental state].

Mirzayance argues that defense counsel should have requested a modified version of CALJIC 4.21 which would have added "or had a mental defect" after "intoxicated." However, defense counsel did advocate for an instruction similar to modified CALJIC 4.21 and vigorously objected to the contrary instruction given by

the trial judge.

During discussions with counsel, the judge stated his intention to instruct the jury that "the mental process necessary for a finding of deliberation and premeditation is not dependent on the motivation for the act nor is the necessary mental process lacking when the considerations reflected on by the defendant were the product of mental disease or defect." (emphasis added). Defense counsel objected, and when the court indicated its decision to allow the instruction, defense counsel requested an additional instruction to read: "However, you should consider all the defendant's mental processes at the time of the killing as you understand them to be in weighing and considering whether the defendant did in fact deliberate the commission of the crime."

The judge declined to give the supplementary instruction. Although defense counsel's request for an instruction stating that the jury could consider mental processes in determining whether the defendant premeditated or deliberated did not succeed, counsel still made these arguments to the court. Defense counsel was not ineffective for failing to request a modified form of CALJIC 4.21 as counsel argued for a similar instruction that was denied.

VIII

Mirzayance argues that counsel was ineffective because he failed to request CALJIC 8.73 (1995). CALJIC 8.73 (1995) reads,

> When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also

> shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree.

The California Court of Appeal determined that counsel's presentation did not fall below an objective standard of reasonableness because there was no evidence of provocation sufficient to support a provocation instruction. The Court of Appeal explained, "[t]hat [the victim] may have been short with defendant does not establish provocation." Given the scarce evidence supporting provocation, the court of appeals' determination that counsel was not ineffective for failing to request CALJIC 8.73 was not an objectively unreasonable application of Strickland.

IX

Mirzayance argues that his counsel was ineffective for advising him to abandon the insanity defense and concurring in that withdrawal. Because we conclude that the district court abused its discretion in denying this claim without an evidentiary hearing, we do not reach the merits of this ineffective assistance of counsel claim at this stage.

X

We AFFIRM in part, REVERSE in part, and REMAND with instructions to conduct an evidentiary hearing on whether counsel was deficient for

recommending and concurring in the withdrawal of the insanity defense, and if so, whether this ineffectiveness prejudiced Mirzayance.

Each party shall bear its own costs.

APPENDIX H

FILED
CLERK, U.S. DISTRICT COURT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
JUL 13 2001
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDRE MIRZAYANCE, Petitioner,	No. CV 00-01388 DT (AIJ)
v.	JUDGMENT
RODNEY HICKMAN, Warden Respondent.	

Pursuant to the Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the above-captioned action is dismissed with prejudice.

DATED: July 12, 2001

/S/

DICKRAN TEVRIZIAN
UNITED STATES DISTRICT JUDGE

FILED
CLERK, U.S. DISTRICT COURT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
JUL 13 2001
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDRE MIRZAYANCE,	) No.)CV 00-01388 DT (AIJ)
Petitioner,	)
v.	)ORDER ADOPTING)FINDINGS,
RODNEY HICKMAN, Warden	)CONCLUSIONS AND)RECOMMENDATIONS
Respondent.	)OF UNITED STATES)MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the court has reviewed the Petition for Writ of Habeas Corpus, all of the records herein, the attached Report and Recommendation of United States Magistrate Judge and the objections to the Report and Recommendation which have been filed herein. The court concurs with and adopts the findings and conclusions of the Magistrate Judge after having made a de novo determination of the portions to which

objections were directed.

IT IS ORDERED that Judgment be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation, and the Judgment herein by United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 12, 2001

/S/
DICKRAN TEVRIZIAN
UNITED STATES DISTRICT JUDGE

FILED
CLERK, U.S. DISTRICT COURT
JUN 28 2001
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDRE MIRZAYANCE,	) No. CV 00-01388 DT (AIJ)
Petitioner,	)
v.	) REPORT AND RECOMMENDATION
RODNEY HICKMAN, Warden	) OF UNITED STATES MAGISTRATE JUDGE
Respondent.	)

This Report and Recommendation is submitted to the Honorable Dickran Tevrizian, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEDURAL HISTORY

Petitioner was charged by information with one count of first degree murder. (Return, Exh. F at F415; 1 Clerk's Transcript ("C.T.") 54-55). The information further alleged that petitioner personally used a firearm and deadly weapon in the commission of the offense. (Id.) Petitioner denied the charges and entered a plea of not guilty and an additional plea of not guilty by reason

of insanity (hereafter, the "insanity plea"). (Return, Exh. F at F415; 1 C.T. 64, 68-70).

At the conclusion of the trial's guilt phase, the jury found petitioner guilty of the murder and found true the firearm and deadly weapon allegations. (Return, Exh. F at F415; 2 C.T. 266). Petitioner thereafter withdrew his insanity plea and waived further proceedings on this issue. (Return, Exh. F at F415). The court sentenced petitioner to state prison for a total term of twenty-nine years to life. (Id. at F415-F416; 2 C.T. 285).

Petitioner appealed his conviction. (Return, Exh. A). Petitioner also filed a habeas petition in the California Court of Appeal, which the court considered concurrently with his appeal. (Id., Exh. D; Exh. E at E413; Exh. F at F414; Exh. G at G446). On March 31, 1999, the appellate court affirmed the judgment and denied the habeas petition. (Id., Exh. F at F414, F444; see also id., Exh. G at G445-G446). On May 4, 1999, the appellate court also denied petitioner's petition for rehearing. (Id., Exhs. H, I).

Petitioner filed a petition for review in the California Supreme Court, which that court denied on July 14, 1999 without comment or citation. (Id., Exhs. J, K). Petitioner filed a habeas petition in the California Supreme Court, which that court denied on December 1, 1999 without comment or citation. (Id., Exhs. L, M).

Petitioner filed the instant petition in this court on February 9, 2000. Respondent filed his return on May 24, 2000, and petitioner filed his traverse on July 17, 2000.

The matter is now deemed submitted and ready for decision.

STATEMENT OF FACTS

The conviction in this case arose from petitioner's murder of his cousin, Melanie Ookhtens, in Los Angeles, California.[1] (Return, Exh. F at F415-F416; see 4 R.T. 684).

In two tape-recorded statements to police, petitioner described the circumstances of the murder. (Id. at F416). Petitioner stated that he was at the Ookhtens' home on the evening of October 13, 1995. (Id.) Ookhtens arrived home at around seven p.m. (Id.) According to petitioner, Ookhtens was angry because she saw that petitioner was watching television and told petitioner that they needed to pick up her parents at the airport. (Id.) Ookhtens then went upstairs to her bedroom. (Id.)

Petitioner stated that he waited about forty seconds, then went to Ookhtens' bedroom, knocked on the door, and asked what she was doing. (Id.) Ookhtens replied that she was getting dressed. (Id.) Petitioner complained that they were late, and Ookhtens repeated that she was getting dressed. (Id.)

When petitioner started to enter Ookhtens' room, she told him to get out. (Id.) Petitioner became angry

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1. The court cites to the factual background in the opinion of the California Court of Appeal. (Return, Exh. F at F416-F420). In addition, this court independently has reviewed the relevant portions of the record.

and, after taking a hunting knife from his pocket, entered the room. (Id.) Petitioner approached Ookhtens, who was sitting on her bed. (Id.) Ookhtens asked him what he was doing with the knife. (Id. at F417). Petitioner then stabbed her in the stomach and neck. (Id.)

Ookhtens hit petitioner, and screamed at him to stop. (Id.) Instead, petitioner threw the knife out the bedroom door, took a .25 caliber handgun from his pocket and, from a distance of three feet, shot Ookhtens once in the stomach and three times in the head.[2] (Id.) Petitioner later told police that he shot Ookhtens because she fought back when he stabbed her. (Id.)

Petitioner took the knife and some of his clothes that were at the Ookhtens' home and returned to his apartment in Pasadena, California. (Id.) Petitioner took off his bloody clothes, took a shower, and then put the bloody garments into a trash bag. (Id.) At 8:07 p.m., petitioner called and left the following message on the answering machine at the Ookhtens' home:

> Melan, it's me. I'm sorry to call you back late. I only want to say that I couldn't make it, I can't make it tonight because, well, Laurent called . . . well, I did not go out with him for a month, so he is like let's go out, because he works on weekends. So, go pick up your parents, say '[H]i' to them, drive carefully. But I'll call you guys tomorrow, like in the afternoon, try to see you, or whatever else

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2. Gloria Stone, the Ookhtens' neighbor, testified that she heard screaming and then gunshots from the Ookhtens' home at about 7:20 p.m. that evening. (Return, Exh. F at F417).

happens, don't know. Okay? So bye-bye. (Id.)

After leaving this message, petitioner called Laurent Meira at about 8:15 p.m., and asked if they could meet. (Id.) Meira agreed, and, at about 8:30 p.m., petitioner stopped at Meira's Pasadena apartment to pick him up. (Id.) Petitioner was quiet at first, then told Meira that it was no good to be "high," and that he had "messed up big time." (Id.) Petitioner told Meira that he had shot Ookhtens three times in the head, and once in the stomach. (Id. at F417-418). Petitioner then stopped his car in front of a Burger King restaurant, took a trash bag from the trunk, and threw the bag into a trash container. (Id. at F418). Petitioner then got back into the car and started driving. (Id.)

Meira suggested that petitioner drive to a police station. (Id.) After thinking about it for a moment, petitioner agreed, stopping to buy a drink at a 7-Eleven store before driving on to the Pasadena Police Station. (Id.)

At about 9:30 p.m., petitioner approached Sergeant Michael Korpal of the Pasadena Police Department. (Id.) Petitioner told Korpal, "I messed up tonight, I killed my cousin." (Id.) Petitioner also told Korpal that he had smoked a couple of hashish cigarettes about an hour before the shooting, and that he thereafter had an argument with his cousin, followed her upstairs to her bedroom, and shot her. (Id.) Korpal handcuffed petitioner, and took him and Meira into the station.[3/]

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3. Following a consensual police search, a .25 caliber handgun, and ammunition were retrieved from petitioner's car.

(Id.)

After being advised of and waiving his constitutional rights, petitioner told Korpal what had taken place. (Id.) Among other things, petitioner stated that he was angry at Ookhtens because she had hung up on him the previous day. (Id.) The following morning, petitioner also spoke to Detective Robert Felix about the shooting, and told him that he had bought the gun he had used about five or six weeks before. (Id.) Petitioner said that he had been carrying the gun in his pocket for the three days prior to the shooting, but did not know why he had done so. (Id.) Petitioner said that he had the knife in his possession only that day. (Id.)

Petitioner told Felix that, the day before the shooting, petitioner called Ookhtens and asked what she would be doing the following day. (Id.) According to petitioner, Ookhtens responded, "I can't really talk to you, I have to go. Bye." (Id.) Petitioner said that this response angered him. (Id.)

Petitioner also told Felix that he shot Ookhtens "[b]ecause she was getting too much, was causing too much bad stuff on me when I did nothing; that's why. And for the fact that I was on the drugs, I didn't think what I was doing." (Id. at F418-F419).

It was later determined that Ookhtens suffered three gunshot wounds to the head (including two to the

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(Return, Exh. F at F418). A .25 caliber shell casing was recovered from petitioner's pocket. (Id.) The trash bag petitioner threw away was also recovered, and found to contain petitioner's bloody clothing. (Id.)

right temple and one to the top of the skull), one gunshot wound to the abdomen, and nine stab wounds, including two to the chest. (Id. at F417). The two gunshot wounds to the temple were consistent with petitioner having shot Ookhtens while he stood over her as she sat on the bed. (Id.) The gunshot wound to the top of the skull was consistent with petitioner having shot her after she was laying on the ground. (Id.) Any of the gunshot wounds would have been fatal. (Id.) Either of the two stab wounds to Ookhtens' chest also would have been independently fatal. (Id.)

The urine sample petitioner provided after the offense tested negative for the presence of marijuana and hashish, a result that was inconsistent with petitioner's claim that he had smoked two hashish cigarettes earlier. (Id. at F418). As discussed below, petitioner presented a mental health defense at trial regarding his ability to premeditate and deliberate the crime. (Id. at F419-F420).

PETITIONER'S CONTENTIONS

1. Petitioner was deprived of due process by an "unremitting display of spectator misconduct" by the victim's family and supporters, which tainted the trial and prejudiced the jury, in violation of the Fifth, Sixth, and Fourteenth Amendments. (Petition at 6).

2. The trial court committed constitutional error by accepting the withdrawal of petitioner's insanity plea at the conclusion of the guilt phase without making the proper determination as to whether the withdrawal was voluntary and intelligent, "in contravention of rights guaranteed by the Fifth, Sixth, and Fourteenth

Amendments." (Id. at 7; Supplemental Petition at 15).

3. Petitioner received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments when his trial counsel: (a) called "but one defense witness who was ill prepared to give testimony, much less be the witness through which all of the evidence [relating to petitioner's mental state defense] could be presented" during the trial's guilt phase; (b) conceded second degree murder to the jury when a viable manslaughter defense existed; (c) presented a "token mental state defense to the deliberation element of first degree murder when a wealth of other expert evidence was available"; (d) failed to produce "other available non-expert evidence to refute prosecution arguments"; (e) failed to investigate the case; (f) withdrew "an extremely strong NGI defense without a tactical reason or any benefit whatsoever"; (g) advised petitioner "to give up the insanity defense without informing him of the expert witnesses who would testify he was legally insane"; (h) advised petitioner to withdraw his not guilty plea without an evaluation of his mental state for competence; (i) failed to examine the evidence, corroborate petitioner's use of marijuana, or confer meaningfully with petitioner; and (j) failed to request jury "instructions on mitigating mental states to refute premeditation and deliberation." (Petition at 7-8).

4. "Prosecutorial misconduct prejudiced petitioner's fair trial rights during final argument by criticizing Dr. [Paul] Satz's testimony for not discussing petitioner's ability to premeditate, the very point [the prosecutor] had earlier had the court prohibit him from mentioning. Alternatively, if the argument was proper,

then counsel was ineffective for not calling six experts to testify that petitioner's mental infirmities drastically impeded any capacity for premeditation and deliberation." (Id. at 8).

STANDARD OF REVIEW

This court may grant federal habeas corpus relief only if Petitioner "is in custody in violation of the Constitution or laws or treaties of the United States."[4] 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act imposes new requirements for the granting of habeas relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme

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4. State law errors are not cognizable on federal habeas corpus. 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 480 (1991); Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 874 (1984).

Court precedent if the state court applies a rule that contradicts the governing law set forth in such precedent, or confronts a set of facts that are materially indistinguishable from such precedent, and, nevertheless, arrives at a different result. Williams v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 1523 (2000).

A state court decision makes an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule from such precedent, but unreasonably applies it to the facts of the case, or either unreasonably extends a legal principle from such precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply. Id. The Ninth Circuit has held that, under Williams, "in order for a state court's application of federal law to be unreasonable, it must have been clearly erroneous." Tran v. Lindsey, 212 F.3d 1143, 1149 (9th Cir.), cert. denied, ___ U.S. ___, 121 S. Ct. 340 (2000); see also Weighall v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000).

DISCUSSION

A. Petitioner's Claim Alleging Spectator Misconduct Does Not State a Federal Constitutional Violation.

In his first claim, petitioner contends that he was deprived of due process by an "unremitting display of spectator misconduct" by the victim's family and supporters, which allegedly tainted the trial and prejudiced the jury in violation of the Fifth, Sixth, and Fourteenth Amendments. (Petition at 6). According to

petitioner,

> the family and supporters of the victim daily packed the undersized . . . courtroom and adjacent hallways and made evident their presence and intensely partisan feelings to the jury through clothing, yellow ribbons, courtroom outbursts of weeping, groaning, facial grimaces, and verbal attacks on petitioner's family and attorneys. The result was that the case was tried in a highly emotionally charged atmosphere . . . . The trial court took no corrective action to stop the spectator misconduct and keep it from unfairly influencing the jurors. As a result, petition[er] was denied the basic American constitutional guarantee of a fair trial by an unbiased jury.

(Supplemental Petition at 5 , 14-15). In support of this claim, petitioner cites to "on the record" occurrences, as well as "matter[s] the attorneys and judges may not have seen or heard, but the jury [allegedly] did." (Id. at 5-14).

The appellate court rejected petitioner's claim of spectator misconduct, noting that there was nothing in the record to suggest that this alleged misconduct had been brought to the attention of the trial court "so that it could eject from the courtroom any person or persons creating a disturbance or otherwise threatening the fairness of the proceedings, nor that he requested any admonition to the jury to ignore the alleged misconduct." In light of these circumstances, the court of appeal concluded that petitioner had not been deprived of due process due to spectator misconduct.[5/]

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5. Petitioner subsequently asserted this and the petition's

(Return, Exh. F at F443).

1. The State Court's Conclusion That Petitioner Received a Fair Trial Is Not an Unreasonable Application of Federal Law to the Facts of Petitioner's Case.

Although predicated on an unreasonable recapitulation of the record in petitioner's case, the ultimate decision of the California Court of Appeal, i.e., that petitioner received a fair trial and the constitutional protections of due process, is not clearly erroneous.[6/]

Due process guarantees a criminal defendant a

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other claims before the California Supreme Court on direct and collateral review. (Return, Exhs. J and L). That court denied the claims without reasoned opinions. (Id., Exhs. K and M). Under the "look through rule" of Ylst v. Nunnemaker, this court presumes that the Supreme Court's silent denials adopted the reasoning of the Court of Appeal with respect to all the claims herein, and, therefore, this court will "look through" the Supreme Court's silent denials to the opinion of the Court of Appeal. 501 U.S. 797, 803, 111 S. Ct. 2590, 2594 (1991).

6. The appellate court rejected petitioner's claim of spectator misconduct based on an erroneous belief that petitioner's counsel had not contemporaneously objected to the audience's behavior. (Return, Exh. F at F433). The record, however, shows that defense counsel asserted a number of objections to what he thought the spectators were doing during petitioner's trial, and called those matters to the court's attention. (Return, Exh. D at D297-298, D338, D352; Supplemental Petition at 4-15; 2 R.T. 310-11; 3 R.T. 483-84; 4 R.T. 686-92). The state court's factual determination that petitioner had not preserved this objection at trial is, therefore, an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

"'fair trial in a fair tribunal.'" Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797 (1997) (citation omitted). "Central to the right to a fair trial . . . is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence offered at his trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" Holbrook v. Flynn, 475 U.S. 560, 567, 160 S. Ct. 1340, 1345 (1986) (citation omitted).

Certain trial circumstances pose a threat to the fairness of the fact-finding process and, as such, they are considered inherently prejudicial. Id. at 567-68, 106 S. Ct. at 1345 (citations omitted). However, even an inherently prejudicial practice is permissible if it is "justified by an essential state interest specific to each trial." Holbrook, 475 U.S. at 568-69, 106 S. Ct. at 1345-46; Estelle v. Williams, 425 U.S. 501, 504-05, 96 S. Ct. 1691, 1693 (1976); Morgan v. Bunnell, 24 F.3d 49, 51 (9th Cir. 1994).

If, however, the challenged circumstance is not considered to be inherently prejudicial, the court must then determine whether the petitioner was actually prejudiced by it. Holbrook, 475 U.S. at 572, 106 S. Ct. at 1347-48.

Thus, when reviewing a constitutional challenge to a state court proceeding, the federal court must "look at the scene" created for the jurors, and decide whether what the jurors saw was "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." Id., 475 U.S. at 567, 160 S. Ct. at 1345. If the challenged practice is not found inherently prejudicial,

then the court must consider whether the defendant suffered actual prejudice from the challenged conduct. Id. If actual prejudice cannot be established, then petitioner's due process claim fails. Id.

a. Petitioner's Claim that the Jury Was Adversely Influenced by Disruptive Spectator Behavior During His Trial Is Not Supported by the Record.

Although petitioner claims that the victim's supporters repeatedly disrupted the proceedings and interfered with the jury's impartial determination of the issues presented, the record fails to support that contention.[7] For example, petitioner contends that during the testimony of his expert, Dr. Satz, the audience was responding verbally and facially to the testimony. (3 R.T. 483-84). The trial judge, however, who was watching the spectators and jury during Dr. Satz's examination, found that the spectators had not grimaced or audibly reacted to the testimony.[8] (3 R.T.

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7. Petitioner's declarations attesting to examples of spectator misconduct "that the attorneys and judges may not have seen or heard" cannot be considered as part of the record in this case. (Petition Memorandum at 13; Supplemental Petition at 9-14). None of the declarations establish that the jurors saw these otherwise unobserved instances of spectator misconduct. As such, these alleged events cannot be considered to make up the "scene presented to jurors" at petitioner's case, nor can they constitute a source of actual prejudice. See Holbrook, 475 U.S. at 567, 160 S. Ct. at 1345.

8. Petitioner fails to provide clear and convincing evidence to rebut the trial court's findings regarding the spectators' conduct. Although the petitioner submitted declarations from Dr. Satz and his colleague, their statements fail to establish what (if anything) the jury saw or heard, and are also impermissibly vague

484). Similarly unsubstantiated is petitioner's claim that an unidentified spectator's sobbing was heard by the jury. (2 R.T. 421-23). Nor does the record support petitioner's assertion that the jury saw, heard, or knew about a confrontation between petitioner's father and a member of the victim's family.[9] (2 R.T. 310; see 3 R.T. 484). Nor is there anything in the record that supports petitioner's claim that the jury understood and was influenced by the yellow ribbons worn by the victim's mother and six other unidentified spectators. (Supplemental Petition at 6 , 11-12). Petitioner fails to establish that the jury noticed the ribbons, that they knew the meaning of the ribbons, or that the ribbons were interpreted by the jury as a validation of petitioner's guilt.[10]

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as to time, duration, place and description. (Supplemental Petition at 11-12). In the absence of evidence to the contrary, this court must defer to the factual findings of the trial judge. See Bains v. Cambra, 204 F.3d 964, 972 (9th Cir.), cert. denied, ___ U.S. ___, 121 S. Ct. 627 (2000).

9. Petitioner's reliance on a witness' tears to establish spectator misconduct is wholly misplaced. After viewing a photograph of the victim, Grigor Atoian started to cry. (4 R.T. 686-90). The court immediately called a five-minute recess and dismissed the jury. (Id.) The trial judge denied petitioner's request to instruct the jury that they were to disregard the witnesses tears and to sanction the prosecution, although it granted the request to strike the witness' identification testimony from the record. (4 R.T. 690-92). The court noted that the spectators and witnesses had done a commendable job of keeping their emotions in check and that it was unreasonable to expect the proceedings to be entirely devoid of any emotions. (4 R.T. 691). After regaining his composure and assuring the court that he could proceed without further emotion, Atoian resumed his testimony and apologized to the court for his earlier reaction. (4 R.T. 692-97).

10. Compare, e.g., Norris v. Risley, 878 F.2d 1178, 1181-83

b. The Trial Judge's Repeated Admonitions Reduced Further the Prospect that the Jury was Influenced by the Spectators' Presence in the Courtroom.

In assessing petitioner's claim that the spectator's behavior was "inherently prejudicial," the court must consider the totality of the circumstances, including whether the court provided curative instructions or admonitions. See Sheppard v. Maxwell, 384 U.S. 333, 352-63, 86 S. Ct. 1507, 1517-23 (1966). In this case, the trial judge started the trial with an admonition to the spectators:[11]

> It's been my experience that in trials [that] it's very difficult sometimes for family members or friends to sit and listen to evidence. [¶] I know you are human beings and will have responses. But I don't want anything that will interfere with the jurors. They have a very difficult task. Just do your best to control your emotions. [¶] I know that will be difficult for people. If you find yourself getting into a position where it's really very difficult or disturbing for you, I would recommend that you go outside then, because I don't want to be in a situation to stop and address things. I think it just calls more attention to it.

(1 R.T. 56).

(9th Cir. 1989) (unfair trial circumstances could be shown where spectators wore large "Women Against Rape" buttons during the trial of an accused rapist).

11. Later in the trial, the judge repeated his admonition to the spectators, outside of the presence of the jury. (2 R.T. 310-11).

On three subsequent occasions, the judge further admonished the audience. After defense counsel complained about the spectators during Dr. Satz's examination, the trial judge warned the audience that if he observed any grimacing or other expressions from spectators, he would not hesitate to order the gallery cleared. (3 R.T. 484). And, at two later points in the proceeding, the court sua sponte warned the spectators against talking while the court was in session and instructed them that they were not to react visually to the testimony being given. (3 R.T. 510, 557-58).

The trial judge also advised the prosecution to ensure that the jurors had no contact with the family and friends of the victim, and instructed them to wait until the jurors were excused before leaving the courtroom. (3 R.T. 485).

Given the trial judge's careful monitoring of the situation and his success at keeping the emotional issues present during petitioner's trial in check, it cannot be concluded that the "scene presented to jurors" was inherently prejudicial. See, e.g., Norris, 878 F.2d at 1183. Nor can this court find that the wearing of yellow ribbons and some shedding of tears by family members and a single witness caused petitioner actual prejudice. Holbrook, 475 U.S. at 567, 160 S. Ct. at 1345; Sheppard, 384 U.S. at 352-63, 86 S. Ct. at 1517-23; Norris, 878 F.2d at 1182.

Petitioner's first claim, therefore, should be dismissed with prejudice.

B. Petitioner States No Federal Constitutional Violation Regarding His Decision to Abandon His Insanity Plea.

In his second claim, petitioner contends that the trial court's decision to allow him to withdraw his insanity plea without first making a determination that the decision was both voluntary and intelligent, constitutes a violation of "the Fifth, Sixth, and Fourteenth Amendments." (Petition at 7; Supplemental Petition at 15). Petitioner asserts that if the trial court had conducted a proper inquiry, it would have discovered that petitioner was "indisputably psychotic," sleep deprived, "taking heavy doses of anti-psychotic and anti-depressant medication," and incapable of making a rational choice about how to proceed. (Supplemental Petition at 15-24). Further, petitioner complains that he had been "intentionally shielded from any knowledge of the nature and magnitude of his mental disorders by his attorneys and psychiatrists" and had been led to believe that his case was hopeless. (Id.) Thus, petitioner contends that the trial court's acceptance of the withdrawal of his insanity plea did not comport with due process. (Id.)

As with petitioner's first claim, the record does not comport with petitioner's version of events surrounding the withdrawal of his insanity plea. The record demonstrates that the trial court conducted an extensive voir dire, with defense counsel's assistance, to verify that petitioner fully understood the ramifications of his decision to withdraw his plea, including expressly stating the sentencing consequences of that decision. (5 R.T. 873-78). The trial judge also specifically inquired regarding petitioner's medications, and was able to

verify that petitioner was currently taking his medications as prescribed. (5 R.T. 877). Nothing about this aspect of the proceeding supports petitioner's contention that his medication and psychotic condition precluded him from assisting in his defense and participating in the case.[12/] Petitioner had taken these medications from the beginning of the trial proceedings in this case. (1 R.T. 16-17).

Nor is there any support in the record for a claim that petitioner was not fully informed with regard to the consequences of his decision to withdraw his insanity plea and his reasons for doing so. After the jury reached its verdict in the guilt phase, defense counsel informed the court that petitioner wished to withdraw his insanity plea, and forego the trial's upcoming insanity proceedings .[13/] (5 R.T. 873-74). Counsel stated that

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12. Petitioner does not argue, nor does the record support, that the medication affected his competence to stand trial. (Id.; 5 R.T. 877). Cf. Godinez v. Moran, 509 U.S. 389, 398, 113 S. Ct. 2680, 2686 (1993) (competence standard for pleading guilty is the same as the competence standard for standing trial, and is not a higher standard). Although petitioner has submitted declarations from various mental health professionals stating that it was "unlikely" that he was competent to waive his plea as a result of his alleged mental health problems, petitioner does not dispute that he was competent to stand trial, the guilt phase of which had ended the previous day. (5 R.T. 865-73). Indeed, petitioner contends that he would have been competent to proceed with the remaining trial proceedings had the insanity phase gone forward the very day he waived the option of doing so. (Petition at 8; Petition Memorandum at 29-30; Supplemental Petition at 16, 53-64; Traverse at 23-25).

13. Under California law, if a defendant pleads not guilty and joins it with a plea of not guilty by reason of insanity, the issues of guilt and insanity are tried separately. People v. Hernandez, 22 Cal. 4th 512, 520, 93 Cal. Rptr. 2d 509, 514 (2000).

petitioner's decision centered upon counsel's "firm belief" that the empaneled jury would not find petitioner insane based on the psychiatric, psychological and other testimony that counsel had to present. (Id.) Although counsel acknowledged that he could file a motion to empanel a new jury to consider the question of petitioner's sanity, he did not believe that any such motion would be successful. (Id.)

Counsel expressly told the court that he had discussed the matter with petitioner and that, based on counsel's recommendation, petitioner was willing to "waive and give up his right to continue his plea of not guilty by reason of insanity and to withdraw that plea at this time." (5 R.T. 874). Petitioner, who wae present during counsel's colloquy with the trial judge, did not dispute the statements of his counsel. (Id.)

The court agreed to allow counsel to "take the waiver" from petitioner. (Id.) In response to counsel's questions, petitioner stated that he understood (1) that he had previously entered a plea of not guilty by reason of insanity; (2) that the jury in his case "now has an opportunity to determine from the evidence [petitioner was] going to present and from the evidence previously presented in the trial" whether or not petitioner was insane at the time the offense was committed; (3) that petitioner bore the burden of proving his insanity by a

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In this case, petitioner initially entered both such pleas, and elected to waive his insanity plea only at the conclusion of the guilt phase of his trial. (1 C.T. 68-69; 5 R.T. 873-78). A defendant may withdraw his insanity plea, even after a guilty verdict has been reached following the conclusion of the trial's guilt phase. See Hernandez, 22 Cal. 4th at 520, 93 Cal. Rptr.2d at 514; People v. Redmond, 16 Cal. App. 3d 931, 938, 94 Cal. Rptr. 543, 548 (1971).

preponderance of the evidence; and (4) that a finding of insanity by the jury would result in petitioner's "place[ment] in the mental health system, and that the mental health system would determine if and when [petitioner] were ever to be released; and [that petitioner would have] a right to come back to court and have a jury again determine whether [petitioner was] safe to be in the community; and while in the mental health system, [petitioner] could be placed in various institutions and perhaps even on an outpatient basis." (5 R.T. 874-75).

The court then informed petitioner that if he were to withdraw his insanity plea, he would forgo his jury or court trial to determine whether he was sane or insane at the time of the offense, and asked petitioner whether he understood this consequence. (5 R.T. 875). Petitioner responded that he did. (Id.) The court told petitioner that, as a result of withdrawing the insanity plea, "the question of your insanity will not be considered, and you will be presumed sane at the time of the crime." (Id.) Again, when asked whether he understood, petitioner responded that he did. (5 R.T. 875-76).

The court, defense counsel, and the prosecution then discussed sentencing considerations with petitioner. (5 R.T. 876). The court informed petitioner that, as a result of the plea withdrawal, he would be "sentenced into the criminal justice system, which means you will be sentenced to the adult authority for a terrn of imprisonment to be set by the court." The court then asked whether petitioner understood that consequence, and petitioner stated that he did. (Id.) Defense counsel, with input by the prosecution, also told

petitioner that the court would sentence petitioner "as a matter of law, to 25 years to life," with up to ten additional years on the enhancements, "[s]o that the maximum term you could be sentenced to in the criminal justice system is 35 years to life." (Id.) When asked by his attorney if he understood that fact, petitioner responded that he did. (Id.)

Defense counsel then asked petitioner, "[i]n view of all these factors, and knowing your rights, do you waive and give up your right to continue with your previously entered plea of innocent and therefore withdraw your plea of not guilty by reason of insanity?" (5 R.T. 876-77). Petitioner responded that he did. (5 R.T. 877). Defense counsel then asked whether petitioner had "any questions" regarding the plea withdrawal. (Id.) Petitioner responded that he had "[n]o questions." (Id.)

The trial judge then noted that petitioner was "on a variety of psychiatric medications." (Id.) The court specifically asked petitioner whether he felt as though he were "right now . . . mentally and emotionally able to make that kind of a decision" to waive his insanity plea. (Id.) Petitioner responded that he was. (Id.) The trial judge asked petitioner which medications he was currently taking. (Id.) Petitioner stated that he was taking "four different ones," and identified them by name. (Id.) The court then asked petitioner whether petitioner had taken his dosage of those medications on the previous and present days, and petitioner responded that he had. (Id.)

The court asked defense counsel whether he concurred in petitioner's withdrawal of the insanity plea. (Id.) Defense counsel responded that he did

concur, and noted that the withdrawal "is my recommendation also." (5 R.T. 877-78). After the court asked defense co-counsel the same question, co-counsel stated that he also concurred in the petitioner's decision to withdraw his insanity plea. (5 R.T. 878). The court then granted petitioner's motion to withdraw the insanity plea. (Id.)

After granting petitioner's motion, the court advised counsel and petitioner that he would disclose to the jurors that petitioner had elected to forgo his insanity defense. (5 R.T. 879). The judge then asked petitioner whether he wanted to be present during this discussion, and petitioner indicated that he would prefer to leave the courtroom. (Id.) After petitioner left, the judge called the jury in and, in the presence of defense counsel and the prosecution, informed the jury of the plea withdrawal. (5 R.T. 880-81). As the judge observed:

> I think [that the waiver of the insanity plea] was given a lot of thought and consideration by [petitioner] and by defense counsel. I'm satisfied that it was not something that was hastily entered into, and that everyone is aware of the consequences of that. So the plea has been withdrawn and the verdict has been entered.

(Id.)

In ruling on petitioner's challenge to the trial court's acceptance of the withdrawal of his insanity plea, the California Court of Appeal found that due process had not been denied. (Return, Exh. F at F442). "The record reflects that the trial court reassured itself that [petitioner] was 'capable of understanding the nature

and purpose of the proceedings against him, that he comprehend[ed] his own status and condition with reference to such proceedings, and that he [was] able to assist his attorney in the conduct of his defense.'" (Id., citation omitted).

The appellate court's conclusion in this regard is neither contrary to or an unreasonable application of federal decisional law on the subject. 28 U.S.C. § 2254(d). Federal law does not require trial courts to take the same waivers set forth in Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969) when a defendant decides to forego the defense of insanity, and an insanity hearing is obviated by a resulting withdrawal of the plea. Morgan, 24 F.3d at 52. Rather, the court may fully discharge its obligations by advising the accused that he is "giving up his right to a jury trial as to sanity." (Id., citing Boykin, 395 U.S. at 243-44, 89 S. Ct. at 1712-13.

In petitioner's case, the trial judge clearly advised petitioner that he was giving up his right to a jury trial on the issue of his sanity. (5 R.T. 875-78). The trial court's acceptance of petitioner's withdrawal of his insanity plea, therefore, accords fully with the requirements of federal constitutional law.[14/] The trial

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14. Petitioner erroneously contends that the trial court had a duty to determine (1) his present sanity; (2) his ability to make rational choices; (3) his knowledge or understanding that he had a strong insanity defense and what he was giving up by the waiver; (4) whether he was under the false impression, provided by his attorney, that his case was hopeless; and (5) whether he lacked sleep, before allowing him to withdraw his plea. (Supplemental Petition at 15-24). Where, as in this case, a defendant has been found competent to stand trial, the trial court is not required to

judge found, based on an extensive voir dire, that petitioner understood the consequences of withdrawing the plea and wished to do so. (5 R.T. 880-81). That conclusion was not contradicted by defense counsel.[15] (Id.)

There is no factual basis in the record to support petitioner's claim that the trial court committed constitutional error when it accepted petitioner's waiver of his insanity plea.

Petitioner's second claim, therefore, should be dismissed with prejudice.

C. Petitioner's Claim of Ineffective Assistance of Counsel Does Not Support a Grant of Habeas Relief.

In his third claim, petitioner contends that he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments when his trial counsel: (a) called only one defense witness "who was ill prepared to give testimony, much less be the witness through which all of the evidence [relating to petitioner's mental state defense] could be presented;" (b) conceded second degree murder to the jury when a

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make such an inquiry. Morgan, 24 F.3d at 52.

15. See cf. United States v. Clark, 617 F.2d 180, 186 and n. 11 (9th Cir. 1980) (fact that defense counsel apparently considered defendant competent to stand trial "is significant evidence that [defendant] was competent"); Hernandez v. Ylst, 930 F.2d 714, 718 (9th Cir. 1990) (deeming "significant the fact that the trial judge, government counsel, and [defendant's] own attorney did not perceive a reasonable cause to believe [defendant] was incompetent").

viable manslaughter defense existed; (c) presented a "token mental state defense to the deliberation element of first degree murder when a wealth of other expert evidence was available"; (d) failed to produce "other available non-expert evidence to refute prosecution arguments"; (e) failed to investigate the case; (f) withdrew "an extremely strong" insanity defense without a tactical reason or any benefit whatsoever"; (g) advised petitioner "to give up the insanity defense without informing him of the expert witnesses who would testify he was legally insane"; (h) advised petitioner to withdraw his not guilty plea without an evaluation of his mental state for competence; (i) failed to examine the evidence, corroborate petitioner's use of marijuana, or confer meaningfully with petitioner; and (j) failed to request jury "instructions on mitigating mental states to refute premeditation and deliberation." (Petition at 7-8).

The Sixth Amendment guarantees the effective assistance of counsel. Strickland v. Washinston, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 2063 (1984). To prevail on a claim that counsel's assistance was so defective as to require reversal of a conviction, a petitioner must show that: (1) the assistance provided by his counsel fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 687-88, 694, 104 S. Ct. at 2064, 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068.

It is strongly presumed that counsel's conduct is

within the range of reasonable assistance, and that counsel exercised acceptable judgment. Id. at 689, 104 S. Ct. at 2065; Kimmelmann v. Morrison, 477 U.S. 365, 382, 106 S. Ct. 2574, 2586-87 (1986) (Strickland imposes a "highly demanding" standard on petitioner to demonstrate that counsel's conduct constituted "gross incompetence").

Further, "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant . . . [i]f it is easier to dispose of an ineffectiveness claim of the ground of sufficient prejudice . . . that course should be followed." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069; see also Smith v. Robbins, 528 U.S. 259, 286 n. 14, 120 S. Ct. 746, 764 n. 14 (2000); Villafuerte v. Stewart, 111 F.3d 616, 630 (9th Cir. 1997), cert. denied, 522 U.S. 1079, 118 S. Ct. 860 (1998); Williams v. Calderon, 52 F.3d 1465, 1470 n. 3 (9th Cir. 1995), cert. denied, 516 U.S. 1124, 116 S. Ct. 937 (1996). An ineffectiveness claim fails if the court determines that counsel's performance was either reasonable or not prejudicial. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

1. Petitioner Was Not Prejudiced by Counsel's Presentation of the Mental Health Defense and Related Issues.

Petitioner contends that counsel was ineffective during the guilt phase of the trial for relying on a single witness, psychologist Dr. Satz. (Supplemental Petition at 24). According to petitioner, Dr. Satz had little experience in criminal proceedings and was too inexperienced to be relied upon as the sole witness in

support of petitioner's primary defense.[16/] (Id.) Petitioner characterizes counsel's efforts as only a "token mental health defense" and cites to counsel's failure to present and investigate other evidence that would have supported the mental health defense and refuted the prosecution case in other respects.[17/] (Id. at

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16. There is nothing in the record that supports petitioner's characterization of Dr. Satz's experience. In his declaration, Dr. Satz averred that he has court experience and expertise "which spans three decades" in the civil arena of the state and federal courts, including testifying on mental health issues such as competency; has testified in criminal trials; as of 1994, had written or co-written "over 300 professional articles in the area of psychology, medicine and the behavioral sciences"; and, as of the date of his declaration, was retained by the Los Angeles Police Department and District Attorney's Office to determine competency issues. (Petition, Exh. 21 at 1-6). Further, the record reflects that, at defense counsel's request, Dr. Satz extensively prepared for the trial. (Return, Exh. F at F419-F420; Petition, Exh. 21 at 1-6 and Exhs. A and B; Supplemental Petition at 30-33).

17. As "other evidence" that allegedly would have supported the mental health defense and rebutted the prosecution case in other respects, petitioner points to (1) the victim's "friendly" phone calls and letters to petitioner; (2) the anticipated testimony of petitioner's friend that petitioner was a chronic marijuana user and that petitioner was in a "protective brotherly relationship" with the victim; (3) photographs attesting to the "very close and loving" relationship between petitioner and the victim; and (4) lay and documentary evidence that, in the year before the murder, petitioner had been in a car accident, his car had been stolen, his replacement car vandalized, his apartment possessions stolen, and petitioner had been in a rollover car accident -- "all of which purportedly "further[ed] his decline into psychosis." (Supplemental Petition at 25-27; Petition Memorandum at 36). As examples of counsel's alleged failure "to competently investigate the case," petitioner cites (1) his counsel's apparent abandonment of his "announced plans to take a 'split' of the urine" tested; (2) counsel's failure to contact persons who could attest to petitioner's allegedly "mentally troubled youth in

24-29).

Petitioner argues further that his counsel erred in ignoring the "voluminous expert and lay witness testimony" on petitioner's mental health to support a defense of manslaughter. (Supplemental Petition at 25; Petition Memorandum at 48-53).

In rejecting these contentions, the California Court of Appeal stated:

> Apart from whether trial counsel's representation "'fell below an objective standard of reasonableness . . . under prevailing professional norms,'" which we do not find, [petitioner] has failed to establish prejudice. We find there to be no reasonable probability that, but for counsel's alleged errors, a different verdict would have been reached. None of the exculpatory evidence [petitioner] recites, including evidence of his mental disorder, was reasonably likely to persuade a jury that [petitioner] did not premeditate and deliberate the killing.

(Return, Exh. F at F443).

France"; (3) counsel's failure to contact petitioner's aunt, who allegedly would have testified that petitioner called her the morning of the murder to tell her that he expected to accompany the victim to the airport to pick up her parents that evening; (4) counsel's failure to adduce evidence that petitioner had retrieved photographs to give to the victim before he killed her; (5) counsel's failure to investigate the people petitioner had been with the week before the murder or to interview petitioner's brother; and (6) counsel's failure to determine that a suitcase in a photograph of the victim's room belonged to the victim, and not petitioner, as counsel argued. (Supplemental Petition at 27-29, 34-36).

The appellate court's conclusion is neither contrary to or an unreasonable application of federal decisional law on the subject. 28 U.S.C. § 2254(d). If the court assumes, arguendo, that counsel failed to put on more than a "token" mental health defense, petitioner still is unable to demonstrate that he was prejudiced by this omission.[18/] The prosecution adduced overwhelming evidence of premeditation and deliberation in the days before petitioner shot his cousin. Petitioner had obtained a gun and had carried it with him for several days before using it to shoot Ookhtens. (Return, Exh. F at F429). And, petitioner had been carrying a knife for the entire day of the killing. (Id.) The petitioner stabbed Ookhtens multiple times and shot her at close range. This evidence of planning and manner-of-killing further buttressed the prosecution case. Given these facts, it cannot be said that petitioner was prejudiced by his counsel's failure to bring additional mental health experts or to adduce other evidence regarding his close relationship with the victim or his use of illegal drugs.[19/]

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18. Although petitioner contends that his counsel should have put on evidence of petitioner's "troubled" mental history, particularly as it related to his youth in France, such evidence was largely cumulative to other evidence already offered at trial, and, thus, counsel's failure to offer cumulative evidence does not constitute ineffective assistance. Carriger v. Lewis, 971 F.2d 329, 332-34 (9th Cir. 1992) (counsel's failure to introduce cumulative evidence did not constitute ineffective assistance of counsel), cert. denied, 507 U.S. 992, 113 S. Ct. 1600 (1993).

19. Petitioner cites to anticipated testimony regarding petitioner's general marijuana use. (Supplemental Petition at 26; Petition Memorandum at 34-35). This testimony would not have shown that petitioner had smoked marijuana or hashish on the day of the murder. Counsel's refusal to have the negative drug test re-evaluated also cannot be considered ineffective, given that petitioner cites no evidence indicating that the original test was

Petitioner's claim of ineffective assistance of counsel, therefore, must fail. See Strickland, 466 U.S. at 687-88, 694, 697, 104 S. Ct. at 2064, 2068-69.

Nor can petitioner demonstrate prejudice from his counsel's refusal to adduce contradictory expert testimony in an effort to convince the jury to convict petitioner of manslaughter. (Supplemental Petition at 25; Traverse at 18). Although petitioner claimed to have shot and killed his cousin because she defended herself against his stabbing her with a knife, there is nothing in the case to suggest a "heat of passion defense" would have been viable. There is no probability that the jury, which rejected a finding of second degree murder based on similar arguments by defense counsel, would have found petitioner guilty of the lesser offense of manslaughter. Again, given the exceedingly strong evidence of premeditation and deliberation in this case, petitioner utterly fails to demonstrate that he was prejudiced by counsel's failure to adduce what would have been a hopeless manslaughter defense.[20/]

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inaccurate in any way, and, thus, any reason for counsel to have it re-tested. See United States v. Bosch, 914 F.2d 1239, 1245-46 (9th Cir. 1990) (counsel was not ineffective for failing to investigate or present information that "was not so critical, or even sufficiently useful" to the defense).

20. With respect to counsel's mistakenly stating in closing argument that a suitcase at the murder scene belonged to petitioner and arguing that the fact that petitioner brought a suitcase to the victim's home to spend the weekend militated against premeditation and deliberation, the California Court of Appeal found that "[e]ven assuming the argument was not supported by the evidence, however, [petitioner] has failed to show any prejudice. It is not reasonably probable that, had defense counsel failed to make the argument, a different verdict would have been reached." (Return, Exh. F at F436). This court finds

Petitioner, therefore, cannot state a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 687-88, 694, 697, 104 S. Ct. at 2064, 2068-69.

2. Counsel Was Not Ineffective Regarding Petitioner's Waiver of the Insanity Plea.

Petitioner contends that his counsel was ineffective when he recommended that petitioner withdraw his insanity plea after the conclusion of the trial's guilt phase. (Supplemental Petition at 29-30). According to petitioner, counsel's recommendation resulted from a "snap decision" that had "no reasonably strategic purpose," as the insanity defense was "supported by an abundance of expert witnesses and other testimony." (Id. at 29; Traverse at 24). Petitioner argues further that the withdrawal of his "extremely strong" insanity defense was "without any possible benefit to petitioner whatsoever, [and was made] solely because of counsel's unjustifiably pessimistic assessment that 'we can't win.'" (Traverse at 24). Petitioner contends also that counsel did not adequately confer with him regarding the recommended waiver, or determine "whether petitioner could truly understand what the significance of the waiver meant." (Supplemental Petition at 33-34; Petition Memorandum at 64).

The California Court of Appeal denied these contentions along with petitioner's other ineffective assistance claims. (Return, Exh. F at F415, F444). The appellate court's denial is neither contrary to or an unreasonable application of federal law. 28 U.S.C. §

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the appellate court's conclusion regarding this minor evidentiary argument to be reasonable and supported by the record.

2254(d).

As set forth above, the record reflects that, before the commencement of trial, defense counsel worked with at least seven mental health experts regarding petitioner's mental health defense as it applied to the guilt and insanity phases of the trial. (Supplemental Petition at 25, 29-34; Petition Memorandum at 32-33; see also Petition, Exh. 24 at 3, Exh. 7 at 7-8). Defense counsel then participated in a five-day jury selection process, which voir dired the prospective jurors regarding their possible biases toward mental health issues relevant to the trial's guilt and insanity phases. (See Augmented Reporter's Transcript, Vols. 1-4).

During the trial's guilt phase, Dr. Satz testified extensively regarding petitioner's mental health and decisionmaking ability, both with respect to his general history and the incident itself, with Dr. Satz's testimony and conclusions mirroring the anticipated testimony and conclusions of the other defense experts expected to testify during the insanity phase. (Return, Exh. F at F419-F420; Petition, Exh. 21 at 1-6 and Exhs. A and B; Supplemental Petition at 30-33). Despite Dr. Satz's testimony, the jury returned a verdict which found that petitioner had the ability to premeditate and deliberate the murder. (Return, Exh. F at F415; 2 C.T. 266).

Given that the jury rejected Dr. Satz's opinion that petitioner's mental impairments deprived him of the ability to perform the more demanding tasks of deliberating and planning a murder, defense counsel reasonably predicted that this same jury would find plaintiff fully capable of discerning right from wrong and would, therefore, reject the proffered insanity

defense. Defense counsel, who knew what he had to present during the insanity defense portion of the trial, made an informed decision that he did not have sufficient evidence to cause this jury to change its mind. Having concluded that there was no chance of success on the insanity defense, counsel advised his client to waive the defense and to accept the sentence of the court.[21/]

Although petitioner argues that his counsel did not adequately confer with him regarding the recommended withdrawal, he admits that counsel did inform him of the factual basis for his recommendation and, at the hearing on the withdrawal of his insanity defense, petitioner did not dispute counsel's report to the court regarding their discussions of the issue.[22/] (Petition,

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21. Although counsel could have sought the empanelment of a new jury for the insanity phase under California Penal Code section 1026(a), given the extensive voir dire in this case, including the voir dire on the mental health issues relevant to the case, counsel's belief that he did not have grounds to request a new jury to decide the insanity proceedings was reasonable, as the trial court "'must assume, in the absence of any other showing, that the jury has retained its attitude of fairness and impartiality'" throughout the trial. People v. Phillips, 90 Cal. App. 3d 356, 363, 153 Cal. Rptr. 359, 363 (1979) (citation omitted). See Cal. Penal Code § 1026(a) (defendant is required in the discretion of the court to submit the issue of insanity to the same jury which passed on the issue of guilt). And, apart from the fact that failure to make such a futile motion is not ineffective assistance of counsel, James v. Borg, 24 F.3d 20, 26 (9th Cir.), cert. denied, 513 U.S. 935, 115 S. Ct. 333 (1994), there is no showing that a second jury would have been more receptive to petitioner's insanity defense.

22. Though petitioner contends that his counsel did not determine whether petitioner "truly" understood the significance of the waiver, as discussed herein, the record indicates that counsel, both prior to and at the plea withdrawal hearing itself, did

Exh. 15 at 3-4; 5 R.T. 873-78).

Accordingly, on this record, counsel's strategic decision to recommend the withdrawal of the insanity defense, made after consultation with petitioner, was not an unreasonable one, and does not constitute ineffective assistance of counsel.[23/] See Weber v. Israel, 730 F.2d 499, 508 (7th Cir.) (whether to withdraw affirmative defense of insanity lies within realm of attorney's tactical and strategic decisions; no claim of ineffective assistance where counsel consulted with client before withdrawing insanity plea, after counsel's proper exercise of tactical judgment and trial strategy),

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make such a determination, as the trial court agreed. (5 R.T. 873-78, 880-81).

23. In the instant proceeding, defense counsel submitted declarations that state that petitioner's parents' alleged refusal to testify at the insanity phase was another factor in counsel's recommendation that the insanity plea be waived. (Petition, Exh. 24 at 2-3, Exh. 4 at 4). Petitioner's parents submitted declarations which allege that they did not refuse to so testify. (Id., Exh. 16 at 16-17, Exh. 17 at 14-15). The court notes that the parents' refusal to testify at the subsequent sentencing hearing tends to support defense counsel's assertion that the parents had also earlier declined to testify at the insanity phase. (5 R.T. 897). But, even assuming that the parents would have testified at the insanity phase, such testimony would be encompassed within counsel's view that the empaneled jury would not find petitioner to be insane based on the evidence that had been or could be presented. (5 R.T. 873-74). That is, Dr. Satz testified at the guilt phase regarding the parents' discussion of petitioner's mental history, and, therefore, any testimony that the parents could give at the insanity phase would have duplicated or mirrored mental health evidence already "rejected" by the jury. (Return, Exh. F at F419). Accordingly, whether the parents would have testified would not alter the reasonableness of counsel's strategic decision to recommend the withdrawal of the plea.

cert. denied, 469 U.S. 850, 105 S. Ct. 167 (1984). See also Furman, 190 F.3d at 1007; Strickland, 466 U.S. at 690, 104 S. Ct. at 2052.

3. Counsel Was Not Ineffective Regarding the Jury Instructions.

Petitioner contends that his trial counsel was ineffective when he failed to request certain jury "instructions on mitigating mental states to refute premeditation and deliberation," which would have "potentially militat[ed] against a verdict of first degree murder," and allowed the jury "the evidentiary avenues by which [a second degree murder conviction] could be reached." (Petition at 8; Petition Memorandum at 67-68). According to petitioner,

> [T]here were three evidentiary routes by which the jury could reach a second degree murder verdict: 1) provocation/sudden quarrel sufficient to raise a reasonable doubt as to deliberation but insufficient as to establish manslaughter (CALJIC 8.73); 2) intoxication from marijuana and hashish use (CALJIC 4.21); and 3) mental defect sufficient to raise a reasonable doubt as to premeditation and deliberation (CALJIC 4.21, modified).

(Petition Memorandum at 68).

Petitioner's contentions that his counsel's "failure" to request these three instructions have no merit.

a. Counsel Was Not Ineffective for Failing to Request CALJIC No. 8.73.

Petitioner contends that "Dr. Satz's testimony that

an individual with a paranoid schizophrenic disorder such as petitioner becomes irrationally and uncontrollably provoked by what would objectively be viewed as small and insignificant events, e.g., [Ookhtens'] yelling at him for being late" supported the provision of an instruction on provocation and sudden quarrel pursuant to CALJLC No. 8.73. (Id. at 71). Accordingly, petitioner contends that his counsel was ineffective for failing to request the instruction. (Id.)

The California Court of Appeal disagreed, finding that trial counsel's representation did not fall below an objective standard of reasonableness, as petitioner had "not shown that he was entitled to . . . the instructions which he claims his counsel was ineffective for not requesting." (Return, Exh. F at F423).

> "CALJIC No. 8.73 is a 'pinpoint' instruction that relates particular facts to an element of the charged crimes and thereby explains or highlights a defense theory." The evidence of provocation "must 'justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately . . . .'" [¶] There was no such evidence in the case at bar. That Ookhtens may have been short with [petitioner] does not establish provocation.

(Id., citations omitted).

This court must defer to the appellate court's determination that the requested instruction was not merited under California law and the facts of the case. Bains, 204 F.3d at 972. Accordingly, defense counsel was not ineffective for failing to request CALJIC No. 8.73, as neither California law nor the evidence

supported such a request. See, e.g., James, 24 F.3d at 26 (defense counsel's failure to make futile motions or present meritless claims does not constitute ineffective assistance under the Sixth Amendment).

b. Counsel Was Not Ineffective for Failing to Request CALJIC No. 4.21.

CALJIC No. 4.21 instructs a jury that it may consider evidence of a defendant's intoxication to determine whether the defendant had the requisite specific intent or mental state to commit the relevant offense. Here, petitioner contends that the "albeit conflicting" evidence of his use of marijuana or hashish immediately before the shooting entitled him to have his jury instructed pursuant to CALJIC No. 4.21 regarding whether his alleged intoxication "militated against" a finding that he had the mental state to premeditate and deliberate the murder. (Petition Memorandum at 69-70). Petitioner contends further that "there was very strong and uncontradicted evidence of a mental defect, i.e., schizoaffective disorder and psychosis, which [also] militated against premeditation/deliberation," which warranted the provision of a modified version of CALJIC No. 4.21, substituting the term "mental defect" for the term "intoxication." (Id.)

The appellate court found that "[d]efense counsel was . . . not ineffective for failing to request [either version of] CALJIC No. 4.21." (Return, Exh. F at F424). With respect to the modified "mental defect" version of the instruction, the appellate court stated that, under California law,

> the mental process necessary for a finding of deliberation and premeditation is not "lacking

> when the considerations reflected upon by the defendant were the product of mental disease or defect." The modified version of CALJIC No. 4.21 [petitioner] suggests should have been given would have incorrectly instructed the jury to the contrary.

(Id. at F423-F424).

This court must defer to the appellate court's determination that the requested modified instruction is incorrect under California law. Bains, 204 F.3d at 972. Accordingly, defense counsel was not ineffective for failing to request an improper instruction. See, e.g., James, 24 F.3d at 26.

With respect to the intoxication instruction, the appellate court found that

> the only evidence of intoxication was [petitioner's] statement, contradicted by the physical evidence, that he had smoked hashish and that he killed Ookhtens because he was on drugs and did not know what he was doing. Even assuming, arguendo, that such evidence would have been sufficient to warrant the giving of such an instruction had it been requested, this meager evidence of intoxication is not such that the failure to request the instruction constitutes ineffective assistance of counsel. The gist of the defense was mental illness, not intoxication, and it was not an unreasonable tactical decision to refrain from confusing the jury with less compelling theories . . . . In fact, with evidence as sparse on this issue as it was in the case at bar, a reasonable defense attorney could make the strategic

> decision that to introduce this theory of defense would strain his or her credibility with the jury on other important issues and risk an adverse verdict on those issues. Accordingly, under the circumstances here present, it was not unreasonable for trial counsel to not request the instruction.

(Return, Exh. F at F424-F425). The appellate court's conclusion is neither contrary to or an unreasonable application of federal law.

Petitioner's trial counsel reasonably could have determined that pursuing an intoxication defense, and requesting a corresponding jury instruction, had little or no merit, given that the only evidence in support of the claim were petitioner's statements, which were directly controverted by contemporaneous police drug tests conducted only a few hours after the shooting and which indicated that petitioner was not intoxicated on either hashish or marijuana. As in this case, counsel's failure to pursue a non-meritorious claim or instruction on intoxication does not constitute ineffective assistance. See Gordon v. Duran, 895 F.2d 610, 614 (9th Cir. 1990) (failure to argue claim is reasonable where attorney could have determined that claim had no merit, given circumstances of case); Shah v. U.S., 878 F.2d 1156, 1162 (9th Cir.) (an attorney is not ineffective for failing to raise a meritless legal argument), cert. denied, 493 U.S. 869, 110 S. Ct. 195 (1989).

D. Petitioner States No Claim of Prosecutorial Misconduct.

In his fourth claim, petitioner contends that the prosecutor in his case committed misconduct when she

"criticiz[ed] Dr. Satz's testimony for not discussing petitioner's ability to premeditate, the very point she had earlier had the court prohibit him from mentioning." (Petition at 8; Supplemental Petition at 37-38). Specifically, petitioner contends that the prosecutor could not state in closing argument that defense expert Dr. Satz "'never gave an opinion as to whether a person like the defendant could premeditate and deliberate,'" given that "court order and state statute" did not allow Dr. Satz to testify regarding petitioner's ability to premeditate and deliberate. (Supplemental Petition at 37, quoting 4 R.T. 789). Petitioner also contends in the alternative that, if the prosecutor's argument was proper, his counsel was ineffective for failing to elicit testimony from Dr. Satz and five other experts that "a person with petitioner's mental infirmities" could not premeditate and deliberate. (Supplemental Petition at 37-38). Petitioner's fourth claim states no basis for relief.

The California Court of Appeal rejected petitioner's claim of prosecutorial misconduct. (Return, Exh. F at F434-F435).

> [W]e note that the prosecutor did not argue that Satz failed to opine whether [petitioner] actually premeditated and deliberated, an opinion clearly inadmissible under [California] Penal Code section 29, only that he failed to opine whether a person like the defendant could do so. This argument was not improper.

(Return, Exh. F at F434, citation omitted, emphasis in original).

This court must defer to the appellate court's determination that the prosecutor's "argument was not

improper" under California law.[24] Bains, 204 F.3d at 972. Accordingly, the court finds that petitioner has not stated a claim of prosecutorial misconduct on the basis of improper closing argument and that claim should be dismissed with prejudice.[25] See, e.g., United States v.

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24. The appellate court additionally found that no claim of prosecutorial misconduct was stated because "[i]t is not reasonably probable that a different verdict would have been reached had the prosecutor not made the challenged statements during her closing argument," given that the jurors had been instructed to "'determine what facts have been proved from the evidence received in the trial and not from any other source' and that '[s]tatements made by the attorneys during the trial are not evidence.'" (Return, Exh. F at F434-F435, citations omitted). The provision of such instructions militate against a claim of fundamental unfairness arising from a prosecutor's closing arguments. See, e.g., Darden v. Wainwright, 477 U.S. 168, 182, 106 S. Ct. 2464, 2472 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 644, 94 S. Ct. 1868, 1872 (1974); Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000), cert. denied, ___ U.S. ___, 121 S. Ct. 1630 (2001).

25. A fair reading of petitioner's petition for review and habeas petition to the California Supreme Court shows that petitioner's alternative argument regarding the ineffectiveness of his counsel with respect to the expert testimony has not been presented to that court, rendering this alternative claim unexhausted. However, in the interest of judicial economy, the court will consider the claim pursuant to 28 U.S.C. § 2254(b)(2). Any such argument and/or evidence would have been largely cumulative to the evidence and testimony put on at trial regarding petitioner's mental health and his ability to premeditate and deliberate the crime. Counsel's failure to adduce cumulative evidence does not support a claim under Strickland. See Carriger, 971 F.2d at 332-34. Thus, as counsel already presented the evidence "in some form," petitioner has identified no "errors or omissions" by counsel sufficient to support an ineffective assistance claim in this respect. United States v. Rogers, 769 F.2d 1418, 1424 (9th Cir. 1985), cert. denied, 502 U.S. 973, 112 S. Ct. 452 (1991).

Molina, 934 F.2d 1440, 1445 (9th Cir. 1991) (a prosecutor may argue all reasonable inferences based on the evidence during closing argument); Ceja v. Stewart, 97 F.3d 1246, 1253-54 (9th Cir. 1996) ("[c]ounsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom") (citation omitted), cert. denied, 522 U.S. 971, 118 S. Ct. 422 (1997).

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the petition with prejudice.

DATED: June 28, 2001.

/S/
ANN I. JONES
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket

number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

APPENDIX I

COURT OF APPEAL - SECOND DIST.
FILED
MAR 31 1999
JOSEPH A. LANE Clerk
Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDRE MIRZAYANCE, Defendant and Appellant.	B116856 (Super. Ct. No. BA122191)
In re ALEXANDRE MIRZAYANCE, on Habeas Corpus.	B124764

APPEAL from a judgment of the Superior Court of Los Angeles County. Candace J. Beason, Judge.

Affirmed with petition denied.

Eric S. Multhaup and Charles M. Sevilla for Defendant and Appellant.

Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Susan C. Diamond, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Alexandre Mirzayance appeals from the judgment entered following a jury trial which resulted in his conviction of the first degree murder of Melanie Ookhtens. He contends: he was denied effective assistance of counsel and due process as a result of his counsel's failure to timely request and the trial court's failure to give instructions regarding a lack of premeditation; the evidence was insufficient to support the finding of premeditation; he was denied effective assistance of counsel by his counsel's "misapprehension of the evidence and demonstrably unfounded argument to the jury"; the trial court erred in precluding a defense expert from describing the materials he relied upon in forming his opinions and in precluding that expert from testifying as to the effect of psychosis on deliberation; and he was deprived of due process by the trial court's acceptance of his not guilty by reason of insanity plea without adequate inquiry as to whether it was knowing, intelligent, and voluntary. In a petition for writ of habeas corpus which we have ordered heard concurrently with his appeal, defendant additionally contends: he was denied due process by spectator misconduct occurring at his trial; was denied

due process as a result of his unknowing waiver of his not guilty by reason of insanity (NGI) plea; and was denied effective assistance of counsel. We affirm the judgment and deny the petition.

PROCEDURAL HISTORY

Defendant was charged in a one count information with first degree murder. (Pen. Code, § 187, subd. (a).) It was further alleged that he personally used a firearm (Pen. Code, §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)) and that he personally used a deadly weapon (Pen. Code, § 12022, subd. (b)(1)). Defendant denied the charges and entered a plea of NGI. After the jury found defendant guilty of the murder and found true the firearm and deadly weapon allegations, defendant withdrew his NGI plea. He was sentenced to a total of 29 years to life in prison comprised of 25 years to life on the murder charge, plus four years for the firearm use. Sentence on the use of a deadly weapon charge was stayed.

STATEMENT OF FACTS

Viewed in accordance with the usual rules on appeal (*People* v. *Ochoa* (1993) 6 Cal.4th 1199, 1206.) the evidence established that Melanie Ookhtens (Ookhtens) was defendant's cousin. At 4:30 p.m. on October 13, 1995, defendant was sitting in a chair in Ookhtens's parents' home when Ookhtens's grandmother, Nvart Ookhtens (Nvart), and aunt, Mary Choulakian (Mary) arrived. They brought gifts to welcome Ookhtens's parents, Flora and Murod Ookhtens (Flora and Murod), home from vacation. Defendant seemed surprised to see Nvart and Mary. He helped Nvart to put food in the

refrigerator but would not allow her to arrange it. At trial, Nvart testified that defendant seemed different that day.

Mary left to buy some cards and when she returned, she laid three out on a table for Nvart to choose from. Defendant, however, was standing behind Nvart and Mary and reached between them and chose a card himself. Mary and Nvart left shortly thereafter.

In two tape-recorded statements to police, defendant stated that he was watching television at Ookhtens's parents' home when Ookhtens arrived there at 7 p.m. that evening. Ookhtens became angry when she saw defendant there watching television. She told him that they had to pick up her parents at the airport, then went upstairs to her bedroom. Defendant waited about 40 seconds, then went to Ookhtens's room, knocked on her door and asked what she was doing. Ookhtens responded that she was getting dressed. Defendant complained that they were late and Ookhtens repeated that she was getting dressed.

When defendant started to enter Ookhtens's room, she told him to get out. He became angry, took a hunting knife from his pocket and entered the room. With the knife in his hand, defendant walked up to Ookhtens who was sitting on her bed. Ookhtens asked what he was doing with the knife and defendant stabbed her in the stomach and the neck. Ookhtens screamed at defendant to stop and hit him. Defendant threw the knife out the door and took a .25 caliber handgun from his pocket and shot Ookhtens once in the stomach and three times in the head from a distance of three feet. Defendant said he shot Ookhtens because she fought back. At about 7:20 p.m., the Ookhtens' neighbor, Gloria Stone, heard screaming and then gunshots from the Ookhtens home.

Ookhtens died as a result of three gunshot wounds to the head, including two to the right temple area and one to the top of the skull, one gunshot wound to the abdomen and nine stab wounds. The two gunshot wounds to the temple were consistent with defendant having stood over Ookhtens and shooting her in the head as she sat on the bed. The gunshot wound to the skull was consistent with defendant having stood over her and shooting her while she was laying on the ground. Any of the gunshot wounds would have been fatal. Two of the stab wounds were to Ookhtens's chest and would have been independently fatal.

Defendant took the knife and some of his clothes that were at the Ookhtens home and returned to his apartment in Pasadena. He took a shower and put the bloody clothes in a trash bag. At 8:07 p.m., defendant left a message on Ookhtens's parents' answering machine: "Melan, it's me. I'm sorry to call you back late. I only want to say that I couldn't make it, I can't make it tonight because, well, Laurent called . . . well, I did not go out with him for a month, so he is like let's go out, because he works on weekends. So, go pick up your parents, say '[H]i' to them, drive carefully. But I'll call you guys tomorrow, like in the afternoon, try to see you, or whatever else happens, don't know. Okay? So bye-bye."

At about 8:15 p.m., defendant called Laurent Meira and asked Meira to meet him. Meira agreed and defendant picked Meira up outside Meira's Pasadena apartment at about 8:30 p.m. Defendant was quiet at first, then told Meira it was no good to be "high" and that he had "messed up big time." Defendant told Meira that he shot Ookhtens three times in the head and once in the stomach. Defendant stopped the car in front of a Burger King restaurant in Pasadena, took a white trash

bag from the trunk and threw the bag into a trash container. Defendant got back into the car and started driving. Meira suggested that defendant drive to a police station. After thinking about it for a moment, defendant agreed. He stopped at a 7-Eleven Store to buy a drink, then drove to the Pasadena Police Station.

Defendant approached Sergeant Michael Korpal of the Pasadena Police Department at about 9:30 p.m. Defendant said, "I messed up tonight, I killed my cousin." Defendant told Korpal that he had smoked a couple of "hashish" cigarettes about one hour before the shooting, that he had an argument with his cousin, followed her upstairs to her bedroom and shot her. Korpal handcuffed defendant and took him and Meira into the station house.

After being advised of and waiving his constitutional rights, defendant told Korpal what had happened. He said he was angry at Ookhtens for hanging up on him the day before. In a consensual search of defendant's car, a hunting knife, a .25 caliber handgun and ammunition were retrieved. A .25 caliber shell casing was recovered from defendant's pocket. The trash bag defendant threw away was recovered and found to contain defendant's clothing.

A urine sample given by defendant at 12:10 a.m. tested negative for the presence of marijuana and hashish. This result was inconsistent with defendant having smoked two hashish cigarettes seven hours earlier as he claimed.

Later that morning, defendant agreed to speak to Detective Robert Felix about the shooting. Defendant told Felix that he bought the gun about five or six weeks before the shooting and had been carrying it in his pocket for the three days before. Defendant said he did not know why he had done so. Defendant had the knife

in his possession only that day. The day before he shot Ookhtens, defendant called her and asked what she was doing the next day. Ookhtens replied, "I can't really talk to you, I have to go. Bye." This angered defendant. Defendant told Felix he shot Ookhtens, "Because she was getting too much, was causing too much bad stuff on me when I did nothing; that's why. And for the fact I was on the drugs, I didn't think what I was doing."

On behalf of the defense, Dr. Paul Satz (Satz) testified that he was a clinical psychologist and neurologist and Chief of the Neuropsychology Practice at the Neuropsychiatric Institute at the UCLA School of Medicine. Satz examined defendant four times and conducted some 30 psychological tests on him. Satz opined that defendant was of subnormal intelligence with a "very substantial defect in executive functions" and in his ability to use his control functions. The frontal lobe of defendant's brain was damaged. Such damage would cause a person to misperceive what happened around them, to be unable to monitor their own behavior and to then retreat from social situations into a fantasy life.

Satz also reviewed defendant's school and medical records, interviewed his parents, Meira and defendant himself. Defendant's parents told Satz that defendant had experienced auditory hallucinations. They sought help for defendant when he was five years old because of the hallucinations. Defendant was also seen by a mental health professional when he was 13 to 14 years old. Defendant had a fascination with knives and guns, but refused to accompany his father on hunting trips because he was bothered by the sight of blood. Defendant's parents told Satz that defendant was delayed in nearly all of the developmental milestones during his first five years.

Defendant told Satz that his intelligence was subnormal and that he had been a failure from the beginning. He was unable to socialize with other people because it frightened him. Defendant said he had his first auditory hallucination when he was five years old. The voice spoke in French and sounded like a 30-year-old man. It told defendant to steal from his parents, to steal candy and to think bad thoughts, and defendant felt compelled to do what the voice said. He felt great pain if he refused to do what the voice told him to do and he never refused. Defendant said he did not know what he would do if the voice told him to kill his parents, it had never done so. Defendant heard the voice approximately three times a month throughout his childhood and adolescence.

Defendant also told Satz that he had difficulty in school and retreated into a fantasy world. He kept his hallucinations to himself because his parents and psychiatrists rejected the notion or told him the voices would go away. Defendant told Satz he was depressed, isolated, withdrawn, had been ridiculed, and once asked his father to contact Dr. Kervorkian to assist his suicide. When he was an early adolescent, defendant once taunted a peer with a knife, which led to increased alienation by his peers.

Defendant told Satz that he began to hallucinate and felt he was being threatened three days before he shot Ookhtens. The day before shooting Ookhtens, defendant was frightened when he saw spiders and a cat sitting on his stomach. Defendant went into his bedroom and put the knife and gun under his pillow for protection. Satz opined that defendant's belief he was being followed and carried the gun for protection raised the possibility of a paranoid delusional disorder. Meira told Satz that before defendant shot Ookhtens,

defendant told Meira that he smoked marijuana to make the voices go away. Satz testified that marijuana had a calming effect and was used by schizophrenics to self-medicate.

Satz opined that defendant probably suffered from psychosis most of his life and had a psychotic break at the time he killed Ookhtens. A person suffering from the disorders from which defendant suffered would not understand why they committed a murder.

The gist of defense counsel's closing argument was that defendant had no motive to kill Ookhtens, but killed her because of his mental disease. Thus, he argued, there could have been no deliberation or premeditation and defendant was guilty of no more than second degree murder.

DISCUSSION

Effective Assistance of Counsel

Defendant contends he was denied effective assistance of counsel as a result of his counsel's failure to request the jury be instructed with CALJIC No. 4.21 regarding intoxication and CALJIC No. 8.73 regarding provocation.[1/] He argues: "[T]here were three

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1. CALJIC Nos. 4.21 and 8.73 were revised in 1992, several years prior to defendant's trial. The parties, however, both refer to the 1988 versions. In pertinent part, these read as follows: CALJIC No. 4.21: "In the crime of ___ of which the defendant is accused . . . a necessary element is the existence in the state of mind of the defendant of the [specific intent to ___] [mental state[s] of ___]. [¶] If the evidence shows that defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether defendant had such [specific intent] [mental state]. [¶] If from all the evidence you have a reasonable doubt whether the defendant formed such [specific

evidentiary routes by which the jury could reach a second degree murder verdict: 1) provocation/sudden quarrel sufficient to raise a reasonable doubt as to deliberation but insufficient as to establish manslaughter (CALJIC No. 8.73); 2) intoxication from marijuana and hashish use (CALJIC No. 4.21); and 3) mental defect sufficient to raise a reasonable doubt as to premeditation/deliberation (CALJIC No. 4.21, modified)." With respect to CALJIC No. 4.21, defendant maintains that Satz's testimony concerning schizoaffective disorder and psychosis was sufficient to support the giving of a modified version of the instruction, replacing the word "intoxication" with the words "mental defect"; as was evidence of defendant's use of marijuana or hashish immediately before the shooting. With respect to CALJIC No. 8.73, he asserts that the evidence that a person with a paranoid schizophrenic disorder "becomes irrationally and uncontrollably provoked by what would be viewed as small and insignificant events, e.g., [Ookhtens] yelling at him for being late" supported such an instruction. Both contentions are without merit.

Under both the Sixth Amendment to the United States Constitution and article I of the California Constitution, a criminal defendant has a right "to 'the reasonably competent assistance of an attorney acting

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intent] [mental state], you must find that [he][she] did not have such [specific intent] [mental state[s]]." CALJIC No. 8.73 reads: "When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree."

as his diligent conscientious advocate.' [Citations.]" (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 215.) A claim of ineffective assistance of counsel such as to require reversal of a conviction has two components. First, the defendant must show that counsel's representation was deficient in that it "'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*Id.* at p. 216; *People* v. *Walker* (1993) 14 Cal.App.4th 1615, 1623-1624.) Second, the defendant must also establish prejudice before he or she can obtain relief on an ineffective assistance claim. (*People* v. *Ledesma, supra,* 43 Cal.3d at p. 217; *People* v. *Walker, supra,* 14 Cal.App.4th at p. 1624.)

In determining whether counsel's performance was deficient, a reviewing court "must in general exercise deferential scrutiny." (*People* v. *Ledesma, supra,* 43 Cal.3d at p. 216.) Unless there can be no satisfactory explanation for counsel's actions, where the appellate record sheds no light on why counsel acted or failed to act in the manner challenged, the case is generally affirmed on appeal. (See *People* v. *Ledesma, supra,* 43 Cal.3d at p. 218, quoting *People* v. *Pope* (1979) 23 Cal.3d 412, 426.) If trial counsel's challenged act or omission resulted from an informed tactical choice within a range of reasonable competence, the conviction must be affirmed. (*People* v. *Pope, supra,* 23 Cal.3d at p. 425; *People* v. *Walker, supra,* 14 Cal.App.4th at p. 1624.)

"Generally . . . prejudice must be affirmatively proved. . . . "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People* v. *Ledesma, supra,* 43 Cal.3d at pp. 217-218; see also *People* v. *Mayfield* (1993)

5 Cal.4th 142, 175.) "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [¶] . . . . [¶] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687-695.) This reasonable probability must be shown by a preponderance of the evidence. (*People* v. *Ledesma, supra,* 43 Cal.3d at 218.) "Preponderance of [the] evidence" means evidence that has more convincing force and the greater probability of truth than that opposed to it. (See *People* v. *Superior* Court (1971) 18 Cal.App.3d 316, 319, fn. 4.)

Here, defendant has not shown that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. This is because he has not shown that he was entitled to either of the instructions which he claims his counsel was ineffective for not requesting.

"CALJIC No. 8.73 is a 'pinpoint' instruction [citation] that relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory. [Citation.]" (*People* v. *Mayfield* (1997) 14 Cal.4th 668, 778.) The evidence of provocation warranting the instruction "must 'justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately . . . .'" (*People* v. *Fenenbock* (1996) 46 Cal.App.4th 1688, 1705.)

There was no such evidence in the case at bar. That Ookhtens may have been short with defendant does not establish provocation. (Cf. *People* v. *Rich* (1988) 45 Cal.3d 1036, 1112-1113 [evidence that rape victim resisted does not warrant giving of instruction regarding

provocation].)

Defense counsel was also not ineffective for failing to request CALJIC No. 4.21. In *People* v. *Stress* (1988) 205 Cal.App.3d 1259, 1270, the court held that the mental process necessary for a finding of deliberation and premeditation is not "lacking when the considerations reflected upon by the defendant were the product of mental disease or defect." (*Id.* at pp. 1270-1271.) The modified version of CALJIC No. 4.21 defendant suggests should have been given would have incorrectly instructed the jury to the contrary. Further, the only evidence of intoxication was defendant's statement, contradicted by the physical evidence, that he had smoked hashish and that he killed Ookhtens because he was on drugs and did not know what he was doing. Even assuming, arguendo, that such evidence would have been sufficient to warrant the giving of such an instruction had it been requested, this meager evidence of intoxication is not such that the failure to request the instruction constitutes ineffective assistance of counsel. The gist of the defense was mental illness, not intoxication, and it was not an unreasonable tactical decision to refrain from confusing the jury with less compelling theories.

Defendant's reliance on *People* v. *Castillo* (1997) 16 Cal.4th 1009 (*Castillo*) is misplaced. In that case, there was evidence that the defendant smoked PCP before the shootings and that it made him dizzy and affected his mental state. Defense counsel in *Castillo* requested and the trial court gave CALJIC No. 4.21. On appeal, the defendant complained that his trial counsel had been ineffective for not requesting that the instruction be modified to specifically tell the jury that it "should consider the intoxication evidence in deciding whether he *premeditated* the killing." (*Id.* at p. 1014, original

italics.) The California Supreme Court rejected this claim, reasoning that "a reasonable jury would have understood deliberation and premeditation to be 'mental states' for which it should consider the evidence of intoxication . . . ." (*Id.* at p. 1016.) From this, defendant extrapolates the following: "If the presence of the version of CALJIC No. 4.21 provided the basis for the Supreme Court rejecting an ineffective assistance claim, then its absence must necessarily establish the basis for such a claim." (Emphasis in original.) Not so. Here, the evidence of intoxication and mental defect was far less than that present in *Castillo*. In fact, with evidence as sparse on this issue as it was in the case at bar, a reasonable defense attorney could make the strategic decision that to introduce this theory of defense would strain his or her credibility with the jury on other important issues and risk an adverse verdict on those issues. Accordingly, under the circumstances here present, it was not unreasonable for trial counsel to not request the instruction.

Trial Court Error to Give Prosecution's Pinpoint Instruction

Defendant contends he was denied due process and a fair trial as a result of the trial court giving "an instruction pinpointing its position in opposition to [defendant's] argument, while denying the defense a countervailing instruction adverting to the appropriateness of mental state evidence in determining the element of deliberation."[2] He argues the instruction

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2. The People requested and obtained the following special instruction to the jury: "The mental process necessary for a finding of deliberation and premeditation is not dependent on the

incorrectly implied "that evidence regarding lack of motive is irrelevant to the determination of deliberation" and that the defense was entitled to the instruction it requested. (Emphasis in original.) We disagree.

The theory of defense was that the absence of any motive for the killing coupled with the evidence of defendant's mental illness demonstrated the absence of premeditation or deliberation. The instruction given correctly informed the jury that motive was not an element of the offense but that it could be considered as a circumstance. "Absence of motive may tend to show the defendant is not guilty." (See, e.g., CALJIC No. 2.51.) Contrary to defendant's assertion, no juror could reasonably understand the challenged instruction to mean that evidence of motive is not relevant to the determination. With respect to the effect of mental disease or defect on the mental process of a defendant, the instruction correctly informs the jury that the defense of "diminished capacity" is not available.

Nor do we find any error in the trial court's refusal to give a special instruction responsive to the one given at the People's behest. The defense instruction was redundant of other instructions already given.

Sufficiency of the Evidence

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motivation for the act, nor is the necessary mental process lacking when the considerations reflected upon by the defendant were the product of mental disease or defect." Defendant's request for the following addition to that instruction was refused: "However, you should consider all of the defendant's mental processes at the time of the killing as you understand them to be in weighing and considering whether the defendant did in fact deliberate the commission of the crime."

Defendant contends there was insufficient evidence of deliberation to support the verdict of first degree murder. He argues that there is no evidence that he contemplated killing Ookhtens "before the act itself." He argues further, "Even if the carrying a weapon presents some evidence supporting an inference of premeditation, i.e., contemplating a possible homicide beforehand, it does not simultaneously satisfy the requirement of proof of deliberation, i.e., the careful consideration of alternatives and consequences." (Emphasis in original.) We disagree.

In determining the sufficiency of the evidence, this court's role is a limited one. "Under the due process clauses of both the Fourteenth Amendment of the federal Constitution and article I, section 15 of the California Constitution, the test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] In making this assessment the court looks to the whole record, not just the evidence favorable to the respondent to determine if the evidence supporting the verdict is substantial in light of other facts. [Citations.] [¶] The standard of appellate review is the same when the evidence of guilt is primarily circumstantial. 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably

reconciled with a contrary finding does not warrant a reversal of the judgment.'"' [Citations.]" (*People* v. *Holt* (1997) 15 Cal.4th 619, 667.) "'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.].' [Citation.]" (*People* v. *Ochoa, supra,* 6 Cal.4th at p. 1206; see also *People* v. *McLead* (1990) 225 Cal.App.3d 906, 917.)

Pursuant to Penal Code section 189: "All murder which is perpetrated . . . by any . . . kind of willful, deliberate, and premeditated killing . . . is murder of the first degree. . . . [¶] . . . . [¶] To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." Premeditation may be inferred from a variety of circumstances including, but not limited to, the defendant's conduct at the time of the killing. (See *People* v. *Theriot* (1967) 252 Cal.App.2d 222, 238.) In *People* v. *Anderson* (1968) 70 Cal.2d 15, the California Supreme Court identified three categories of evidence as pertinent to the determination of whether the evidence was sufficient to support a finding of premeditation: (1) planning activity; (2) motive; and (3) that the manner of killing was according to a preconceived plan. (*Id.* at pp. 26-27; see also *In re Sergio R.* (1991) 228 Cal.App.3d 588, 597, citing *People* v. *Lucero* (1988) 44 Cal.3d 1006, 1018-1020.) Typically, a verdict predicated upon a finding of premeditation and deliberation will be

sustained when it is supported by some evidence from all three categories, by extremely strong evidence of planning, by evidence of motive and planning, or by evidence of motive and manner of killing. (*People* v. *Anderson, supra,* 70 Cal.2d at p. 27.) This analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or "establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. [Citation.]" (*People* v. *Perez* (1992) 2 Cal.4th 1117, 1125.)

Planning can be inferred from evidence that the defendant obtained a weapon and used it upon the victim. (See, e.g., *People* v. *Miller* (1990) 50 Cal.3d 954, 993; *People* v. *Belmontes* (1988) 45 Cal.3d 744, 792; *People* v. *Alcala* (1984) 36 Cal.3d 604, 626; *People* v. *Haskett* (1982) 30 Cal.3d 841, 850; *People* v. *Francisco* (1994) 22 Cal.App.4th 1180, 1192.) A manner of killing indicating that the defendant acted according to a preconceived design can be inferred from evidence that multiple shots were fired at close range (see, e.g., *People* v. *Thomas* (1992) 2 Cal.4th 489, 518; *People* v. *Francisco, supra,* 22 Cal.App.4th at p. 1192), from evidence that the defendant pursued the victim and fired multiple shots (*People* v. *Boyd* (1985) 38 Cal.3d 762, 770; *People* v. *Wells* (1988) 199 Cal.App.3d 535, 541) and from the absence of any provocation by the victim (*People* v. *Miller, supra,* 50 Cal.3d at p. 993; compare, e.g., *People* v. *Velasquez* (1980) 26 Cal.3d 425, 435 [sudden killing in the course of an argument and struggle does not constitute premeditated murder] with *People* v. *Boyd, supra,* 38 Cal.3d at pp. 769-770 [only evidence of argument or struggle consisted of the victim pushing the weapon away].) In *People* v. *Hawkins*

(1995) 10 Cal.4th 920, the court affirmed a conviction of first degree murder based on evidence that the victim was shot twice, once in the back of the head near the base of the skull and once in the back of the neck. The trajectory of the bullets suggested that the gun was somewhere above the victim's head. The court held, "[A]lthough evidence of planning and motive was indeed minimal if not totally absent in the present case, we conclude that the manner-of-killing evidence was sufficiently strong to permit a trier of fact to conclude beyond a reasonable doubt that the defendant committed the . . . murder with premeditation and deliberation." (*Id.* at p. 957.)

Here, there was evidence that defendant obtained a gun and carried it with him for several days before using it to shoot Ookhtens and that he began carrying a knife on the day of the killing. Moreover, the evidence established that he stabbed Ookhtens multiple times and shot her at close range. This evidence of planning and manner-of-killing was sufficient to permit the trier of fact to conclude beyond a reasonable doubt that defendant killed Ookhtens with premeditation and deliberation.

Due Process

Defendant contends he "was deprived of due process and a fair presentation of his mental state defense by a combination of ineffective assistance of counsel, prosecutorial misconduct, and judicial error regarding Dr. Satz's testimony." He argues that (1) trial counsel was ineffective for failing to prepare Satz to testify regarding premeditation and deliberation, and for not objecting to the prosecutor's criticism of Satz for failing to testify as to defendant's diminished capacity;

(2) the prosecutor's criticism of Satz constituted misconduct inasmuch as Penal Code section 29 prohibits any such testimony; and (3) the trial court erred in refusing to read the premeditation and deliberation instruction to the jury during Satz's testimony. We find no error.

The defense of diminished capacity has been statutorily abolished. (Pen. Code, § 28, subd. (b); *In re Christian S.* (1994) 7 Cal.4th 768, 789-790.) "Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. . . ." (Pen. Code, § 28, subd. (a).) Such evidence is, however, "admissible solely on the issue of whether or not the accused actually . . . premeditated, deliberated, or harbored malice aforethought . . . ." (Pen. Code, § 28, subd. (a).) Notwithstanding the admissibility of such evidence, "any expert testifying about a defendant's mental illness, mental disorder, or mental defect *shall not testify as to whether the defendant had or did not have the required mental states,* which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (Pen. Code, § 29, italics added.) "The apparent meaning of the statutory language is that evidence of mental problems is inadmissible to show that a defendant lacked the capacity to form the requisite mental state, but is admissible to show that the defendant actually lacked the requisite mental state. An expert may testify regarding the defendant's mental

condition so long as the expert gives no opinion on the ultimate question of whether or not the defendant actually had the requisite mental state." (*California* v. *Molina* (1988) 202 Cal.App.3d 1168, 1173, emphasis omitted; see also *People* v. *Aris* (1989) 215 Cal.App.3d 1178, 1198 [error to preclude expert from testifying "as to how the defendant's particular experiences as a battered woman affected her perceptions of danger, its imminence, and what actions were necessary to protect herself"], 1200-1201 [error found harmless because not reasonably probable a different verdict would have been reached absent error] disapproved of on another point in *People* v. *Humphrey* (1996) 13 Cal.4th 1073, 1086; *People* v. *Whitler* (1985) 171 Cal.App.3d 337, 341-342 [psychiatric testimony admissible to show defendant's mental condition actually prevented him from forming requisite state of mind]; *People* v. *Jackson* (1984) 152 Cal.App.3d 961, 969-970 [Pen. Code, § 29 did not preclude testimony describing defendant's mental illness and its effect on his conduct].) Penal Code sections 28 and 29 do not bar a defendant "from presenting expert testimony relating to defendant's mental disorders at the time of the commission of the crimes, or a correlation of the evidence of the crimes to the experts' test results (short of an opinion that as a result of defendant's mental disorders he lacked the capacity to form the intent to kill, or did not in fact have the intent to kill, when committing the crimes). [Citations.]" (*People* v. *Samoya* (1997) 15 Cal.4th 795, 837.) The prosecutor may comment upon and argue the failure of a defense expert to consider otherwise admissible evidence of the defendant's mental condition relevant to the expert's diagnosis. (*Ibid.*)

First, we find no ineffective assistance of counsel. As we have already discussed, to obtain relief on an

ineffective assistance claim, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and (2) prejudice. (*People* v. *Walker, supra,* 14 Cal.App.4th at pp. 1623-1624.) We exercise deferential scrutiny of trial counsel's performance and unless there can be no satisfactory explanation for counsel's actions, where the appellate record sheds no light on why counsel acted or failed to act in the manner challenged, the case is generally affirmed on appeal. (See *People* v. *Ledesma, supra,* 43 Cal.3d at p. 218, quoting *People* v. *Pope, supra,* 23 Cal.3d at p. 426.) If trial counsel's challenged act or omission resulted from an informed tactical choice within a range of reasonable competence, the conviction must be affirmed. (*People* v. *Pope, supra,* 23 Cal.3d at p. 425; *People* v. *Walker, supra,* 14 Cal.App.4th at p. 1624.)

"It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [¶] . . . . [¶] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland* v. *Washington, supra,* 466 U.S. at pp. 687-695.)

Here, the only disputed issue in the case was whether defendant premeditated and deliberated the killing. Prior to his testimony and pursuant to Penal Code section 29, the trial court admonished Dr. Satz as follows: "[Y]ou can talk about any testing you gave. You can give general impressions. [¶] You cannot testify, however, specifically as to whether [defendant] premeditated in this situation, or formed a specific intent in this situation."

Satz testified that he was referred to defendant by defense counsel "to see if [Satz] could shed any light on

this who this [defendant] was." Over four days, he gave defendant about 30 standardized psychological tests. Satz found defendant had subnormal intelligence, language and memory difficulties, and a substantial defect in "his ability to look at a situation, to think about things, to read a situation correctly, to entertain alternative hypotheses, to switch and adapt mental state to the requirements of the task. To think in the abstract form. [¶] . . . [H]e had a fundamental defect in his ability to use his control functions. There was no evaluator, or self monitor." Satz opined that defendant had a structural defect of the brain which would cause him to misperceive situations and, eventually, retreat into a fantasy life. Satz also found defendant to be suffering from "some form of schizophrenic disorder starting very early in life . . . and that it was enduring and continued apparently throughout childhood and adolescence into the time of the assault." There was evidence that defendant experienced auditory hallucinations beginning at the age of five, and had a fascination with knives and guns. Satz's review of defendant's school records, interviews with defendant and his friends and family were consistent with this conclusion.

With respect to the killing, Satz opined that a person with the "nature of illness that [defendant] has can know that he has a knife, know that he has a gun, know that he has become angry, go upstairs with the knife and the gun and being angry stab somebody knowing he did that, shoot somebody and not know why he did it[.]" Satz further opined that defendant was "most probably" angry and impulsive at the time. According to Satz, it is very likely that "someone who suffers with the symptoms of the illness [from which defendant suffered], and having a good relationship with

another person, [could] impulsively kill [that person] as a result of that illness[.]" Satz opined that defendant "was probably psychotic most of his life." Satz defined a psychosis as "a temporary breakdown in reality testing to the point where the person loses the capacity oftentimes to control their impulses . . . ." A psychotic break, Satz explained, is "associated with corresponding changes in metabolic brain function at the time of the event. It is a breakdown in reality testing and control functions."

On cross-examination, Satz defined premeditation and deliberation as "planned intent." Defense counsel objected to further questioning Satz about his knowledge of the legal definition of those terms. The prosecutor maintained she had "a right to ask about [Satz's] legal understanding of what premeditation and deliberation is. . . . If [Satz] doesn't even understand what the legal definitions are then how relevant are his opinions about whether or not a person of [defendant's] condition . . . can premeditate and deliberate." The trial court overruled the objection and refused defense counsel's request that the CALJIC instruction defining those terms be read at that time.[3/] Whereupon, the

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3. CALJIC No. 8.20, which was given in this case, provides in pertinent part as follows: "The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. [¶] The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree. [¶] To constitute a deliberate and premeditated killing, the slayer must weigh and consider the

prosecutor elicited Satz's testimony that, with respect to a murder charge, premeditation and deliberation is "whether the person has a plan or deliberates or plans, has a set operation in order to commit a certain offense, that they spend time planning on it, thinking about it in order to carry it out . . . that it is not a sudden uncontrolled outburst." Satz further testified that, to constitute premeditation and deliberation, the individual had to think about his or her conduct for "a sustained period of time" "more than a few minutes." Satz opined that defendant "does contemplate and evaluate and make judgments, but because of his problem solving method, he sometimes makes errors in judgment."

During closing, the prosecutor argued: "With respect to the issue of premeditation and deliberation, the doctor never gave an opinion as to whether or not a person like the defendant could premeditate and deliberate. His only opinion was that the defendant has a brain impairment which affects his ability to think and affects his ability to control his impulses. [¶] [DEFENSE COUNSEL]: If I might approach. [¶] THE COURT: No. [¶] [THE PROSECUTOR]: He did give an opinion that someone with those types of problems, including his mental illness would act impulsively under the circumstances. What I asked Dr. Satz, though, was, well, under certain circumstances can the defendant plan? He can plan to go to school. He can plan to come to the United States for that school. He can plan to go to school. He can plan to go to his cousin's for the weekend. He can certainly make plans."

First, we note that the prosecutor did *not* argue that

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question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill."

Satz failed to opine whether the defendant actually premeditated and deliberated, an opinion clearly inadmissible under Penal Code section 29, only that he failed to opine whether a person *like* the defendant *could* do so. This argument was not improper. (Cf. *People* v. *Whitler, supra,* 171 Cal.App.3d at pp. 341-342 [psychiatric testimony admissible to show defendant's mental condition actually prevented him from forming requisite state of mind].)

Even assuming, arguendo, that this evidence would have been inadmissible under Penal Code section 28, it is not clear that defense counsel failed to object to the prosecutor's argument. In fact, it appears that he requested but was denied a bench conference. We need not decide whether further objection or request for admonition would have been futile in this case. (See, e.g., *People* v. Hill (1998) 17 Cal.4th 800, 820-821 [no necessity to make timely objection and/or request for admonition if either would be futile].) This is because, apart from whether the failure to object demonstrated representation falling below an objective standard of reasonableness under prevailing professional norms, defendant has failed to demonstrate prejudice.

The jurors were instructed that their duty was to "determine what facts have been proved from the evidence received in the trial and not from any other source" (CALJIC No. 1.00) and that "[s]tatements made by the attorneys during the trial are not evidence." (CALJIC No. 1.02.) We assume the jury understood and followed these instructions. (*People* v. *Holt, supra,* 15 Cal.4th at p. 662 [Jurors are presumed to understand and follow court's instructions.].) It is not reasonably probable that a different verdict would have been reached had the prosecutor not made the challenged statements during her closing argument.

For the same reasons, defendant's claim of prosecutorial misconduct must fail. (*People* v. *Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another point in *People* v. *Hill, supra,* 17 Cal.4th at p. 823, fn. 1 [prosecutor's conduct judged by an objective standard; "When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion"].)

Nor do we find any ineffective assistance of counsel as a result of trial counsel's failure to prepare Satz to testify regarding premeditation and deliberation, or any error by the trial court in refusing to read the legal definition of those terms to the jury during Satz's testimony. Satz testified extensively as to defendant's mental condition, including his ability to make considered decisions. Knowing the legal definition of these terms would not have changed Satz's evaluation of defendant's mental state at the time of the killing.

Ineffective Assistance

Defendant contends he was deprived of the effective assistance of counsel by his trial counsel's "misapprehension of the evidence and demonstrably unfounded argument to the jury." He argues that defense counsel mistakenly referred in closing argument to the fact that defendant brought a suitcase to Ookhtens's home to stay for the weekend as militating against premeditation and deliberation, when there was no evidence introduced that defendant had brought a suitcase with him that weekend. "This mistake must necessarily have embarrassed and undermined the defense in the jury's eyes, much as Dr. Satz was unfairly

embarrassed and impeached by the debacle regarding premeditation and deliberation." We disagree.

First, we note that defense counsel's argument presented a reasonable inference from the ambiguous evidence presented that defendant had been staying with Ookhtens on weekends. Even assuming the argument was not supported by the evidence, however, defendant has failed to show any prejudice. It is not reasonably probable that, had defense counsel failed to make the argument, a different verdict would have been reached.

Restrictions on Satz's Testimony

Defendant contends the trial court erred in "precluding Dr. Satz from describing the contents of materials he relied on in forming his opinion; in refusing to permit Dr. Satz to explain his answers on cross-examination; and in precluding Dr. Satz from testifying as to the effect of psychosis on deliberation." We find the errors to have been harmless.

Evidence Code section 354 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears or record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination." (See also *People* v. *Hansel* (1992)

1 Cal.4th 1211, 1223.) "A miscarriage of justice should be declared only when the reviewing court is convinced after an examination of the entire case, including the evidence, that it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.] Prejudice from error is never presumed but must be affirmatively demonstrated by the appellant. [Citations.]" (*Brokopp* v. *Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853-854; cf. *People* v. *Champion* (1995) 9 Cal.4th 879, 919 [no reasonable probability outcome of trial would have been different if challenged evidence had been excluded].)

Here, defendant has failed to demonstrate a reasonable probability that the outcome of the trial would have been different if Satz had been allowed to testify as to the content of defendant's past psychological records which Satz reviewed, the fact that one of defendant's teachers had reported aggressive acts by defendant when defendant was an adolescent, or Meira's report that defendant had told Meira that defendant had been the victim of three thefts.

Defendant's reliance on *People* v. *Wetmore* (1978) 22 Cal.3d 318, 320-321, for the proposition that he was entitled to have Satz's testimony regarding defendant's sanity "presented for its impact on the guilt phase mental state issues," is misplaced. The holding of that case has been superseded by the enactment of Penal Code sections 25, 28 and 29. (*People* v. *Saille* (1991) 54 Cal.3d 1103.)

Withdrawal of Not Guilty by Reason of Insanity Plea

Defendant contends on appeal and in his petition for writ of habeas corpus that he was deprived of due process "by the trial court's acceptance of the NGI plea

withdrawal without adequate inquiry whether it was knowing, intelligent, and voluntary." He argues that there was no explanation for "this highly unexpected turn of events which had no conceivable benefit to [defendant]" and that "the combination of [defendant's] multiple mental disabilities, the numbing and confusing effects of the psychotropic drugs, and his ignorance of their combined impact on his mental functioning rendered the perfunctory and cursory waiver process constitutionally invalid. The bottom line here is that the trial court had a duty to probe past the perfunctory to determine whether [defendant] had an actual understanding of the rights available to him and the consequences of the withdrawal." In his petition for habeas corpus, defendant argues his waiver "was involuntary and not freely and intelligently made in [that] he was indisputably psychotic at the time and taking heavy doses of anti-psychotic and anti-depressant medication, and there was expert testimony before the court that due to his mental illness, he could not make rational choices between given options." We disagree.

In *People* v. *Redmond* (1971) 16 Cal.App.3d 931 (*Redmond*), the defendant entered pleas of not guilty and NGI to the charge of an assault with a deadly weapon and by means of a force likely to produce great bodily injury. When the jury convicted him of the lesser crime of simple assault, the defendant moved for a withdrawal of his NGI plea "to accept criminal punishment consisting of a county jail sentence, which at most was six months, rather than an indefinite noncriminal commitment to a mental hospital." (*Id.* at pp. 934-935, fn. omitted.) The trial court denied the motion "in view of what it considered 'overwhelming' evidence before it that defendant was insane when he committed the offense." (*Id.* at p. 933.) Defendant was

thereafter found insane and committed to the state hospital. (*Ibid.*) The appellate court reversed the order of commitment and directed the trial court to set aside the insanity verdict and to reconsider the motion to withdraw the NGI plea. It outlined the appropriate procedure to be followed: "(1) The trial court should reassure itself that a defendant at the time he seeks to withdraw his insanity plea is presently sane, i.e., that he is capable of understanding the nature and purpose of the proceedings against him, that he comprehends his own status and condition with reference to such proceedings, and that he is able to assist his attorney in the conduct of his defense. [Citations.] (2) If defendant is found to be presently insane, the solution is obvious. (Pen. Code, §§ 1370, 1367.) (3) If defendant is found to be presently sane, then a series of questions should be propounded to such defendant and to his counsel and the answers thereto be made part of record to meet requirements of *Boykin* v. *Alabama* (1969) 395 U.S. 238 []; *In re Tahl* (1969) 1 Cal.3d 122 []; and *People* v. *West* (1970) 3 Cal.3d 595 [], insofar as they might be applicable to the situation presented. (4) If the court be satisfied that such defendant is making a free and voluntary choice with adequate comprehension of the consequences, then withdrawal of the plea should be permitted." (*Id.* at p. 938.) The court in *Redmond* continued, "What we state in this opinion, of course, is not intended to apply to situations where there is no doubt of a defendant's sanity in the mind of the trial court and the reports of the examining psychiatrists unanimously indicate that such defendant was sane at the time of the offense. Free withdrawal of the insanity plea under such circumstances should be permitted as it has been in the past." (*Id.* at p. 939.) "The procedures set forth in *Redmond* are not necessitated by the

withdrawal of an insanity plea alone, but rather of the withdrawal of the plea by a defendant whose present sanity is doubted." (*People* v. *Huffman* (1977) 71 Cal.App.3d 63, 81; see also *People* v. *Bloom* (1989) 48 Ca1.3d 1194, 1214 [free withdrawal of the insanity plea should be permitted where there is no doubt of the defendant's sanity in the mind of the trial court].) An expert's testimony concerning the defendant's personality disorder is insufficient, as a matter of law, to raise a doubt regarding defendant's sanity. (*People* v. *Bloom, supra,* 48 Cal.3d at p. 1214.)[4]

Here, following the verdict of first degree murder, defense counsel stated: "In view of the finding by the jury of first degree murder, we have gone through the following process: [¶] I understand that I have a right to ask this court to empanel a new jury to consider the question. I believe I do not have such grounds to make such a motion, other than the fact that it is my firm belief that this jury based on their finding will not find the defendant insane on the basis of the evidence that I can present in this case in the form of psychiatric,

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4. In *Bloom*, the defendant was charged with the first degree murders of his father, step-mother and step-sister. As to the murder of his step-sister only, the defendant had entered a NGI plea. After the jury convicted him of all three murders, the defendant withdrew his NGI plea and represented himself in the penalty phase of his trial. The jury returned a verdict of death. Following an "incident of violence" in jail, a hearing was held to determine the defendant's competence; he was found competent and represented himself in sentence modification proceedings. (*People* v. *Bloom, supra,* 48 Cal.3d at pp. 1202-1203.) On appeal, the defendant complained that the trial court failed to "expressly advise him regarding the constitutional rights he would be foregoing by withdrawing his plea, including the privileged against self-incrimination and the rights to jury trial and confrontation." (*Id.* at p. 1214.)

psychological and other testimony I have available to me. [¶] I've had a discussion with the defendant about his rights in this regard, and he is willing to, at my suggestion, and after careful consideration, I think on his part, waive and give up his right to continue his plea of not guilty by reason of insanity and to withdraw that plea at this time. [¶] May I take the waiver from him, unless the court wishes? [¶] THE COURT: No. You may go ahead. I may have some additional questions. [¶] [DEFENSE COUNSEL]: [Defendant], do you understand you have a plea entered previously of not guilty by reason of insanity. [¶] THE DEFENDANT: Yes. [¶] [DEFENSE COUNSEL]: Do you understand that the jury that heard this case now has an opportunity to determine from the evidence we are going to present and from the evidence presently presented in the trial -- [¶] THE DEFENDANT: Yes. [¶] [DEFENSE COUNSEL]: -- Whether or not you were insane at the time of commission of the crime. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] THE COURT: We would have the duty of proving that by the preponderance of the evidence. If we were successful and the jury found you to be insane, you would be placed in the mental health system, and then the mental health system would determine if and when you were ever to be released; [¶] and you have a right to come back to court and have a jury again determine whether you were safe to be in the community; [¶] and while in the mental health system, you could be placed in various institutions and perhaps even on an outpatient basis. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] THE COURT: When you withdraw your plea of not guilty by reason of insanity, there will be no trial by a jury, there will be no trial by a court to determine whether or not you were sane or

insane at the time of the commission of this offense. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And do you understand, therefore, that the question of your insanity will not be considered, and you will be presumed to be sane at the time of the crime. [¶] THE DEFENDANT: Yes. [¶] THE COURT: By withdrawing the plea, you will be sentenced into the criminal justice system, which means you will be sentenced to the adult authority for a term of imprisonment to be set by the court. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] [DEFENSE COUNSEL]: The court will sentence you, as a matter of law, to 25 years to life, and some additional time not to exceed, I think seven years, on the enhancements, which the court will decide at the time and place of your sentence after hearing all arguments on that. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] THE COURT: Ms. [Prosecutor]? [¶] [THE PROSECUTOR]: I would indicate that the enhancements are up to ten years. [¶] [DEFENSE COUNSEL]: Sorry. Up to ten years. So that the maximum term you could be sentenced to in the criminal justice system is 35 years to life. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] [DEFENSE COUNSEL]: In view of all these factors, and knowing your rights, do you waive and give up your right to continue with your previously entered plea of innocent and therefore withdraw your plea of not guilty by reason of insanity? [¶] THE DEFENDANT: Yes. [¶] [DEFENSE COUNSEL]: Do you have any questions on anything we have discussed in that regard? [¶] THE DEFENDANT: No questions. [¶] THE COURT: Ms. [Prosecutor], is there any further inquiry by the People? [¶] [THE PROSECUTOR]: No, Your Honor. [¶] THE COURT: All right. [¶] [Defendant], right now you are

on a variety of psychiatric medications. Do you feel that right now you are mentally and emotionally able to make that kind of decision? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And what medications are you on currently? [¶] THE DEFENDANT: Four different ones. Zoloft, Cogentin, Navane and Vistaril. [¶] THE COURT: Did you have your dosage yesterday? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And how about today? [¶] THE DEFENDANT: Yes. [¶] THE COURT: [Defense counsel], you've indicated that you have spoken with your client about the withdrawal of the not guilty by reason of insanity plea. Would you concur in his withdrawing that plea? [¶] [DEFENSE COUNSEL]: Yes. And it is my recommendation also. [¶] THE COURT: [Defense co-counsel], do you have any objection, or do you concur? [¶] [DEFENSE CO-COUNSEL]: I also concur. [¶] THE COURT: At this time, the court allows the withdrawal of the NGI plea."

We find no denial of due process in the acceptance of defendant's withdrawal of his NGI plea. The record reflects that the trial court reassured itself that defendant was "capable of understanding the nature and purpose of the proceedings against him, that he comprehends his own status and condition with reference to such proceedings, and that he [was] able to assist his attorney in the conduct of his defense." (*People* v. *Redmond, supra,* 16 Cal.App.3d at p. 938.) We are not persuaded otherwise by the averments of Satz and various other doctors who examined defendant.

Spectator Misconduct

In his petition for writ of habeas corpus, defendant contends he was denied due process and an unbiased jury as a result of the conduct of the victim's family and

supporters. He argues they packed the courtroom and adjacent hallways and made their presence and hatred for defendant known to the jury through "clothing, yellow ribbons, courtroom outbursts of weeping, groaning, facial grimaces, and verbal attacks on [defendant's] family and attorneys." He argues further that the spectators "audibly gestured and guffawed at [Satz's] testimony in full view and hearing of the jury." We find no merit in this contention. Defendant points to nothing in the record which would indicate he brought this alleged misconduct to the attention of the trial court so that it could eject from the courtroom any person or persons creating a disturbance or otherwise threatening the fairness of the proceedings, nor that he requested any admonition to the jury to ignore the alleged misconduct. Under these circumstances, we find no denial of due process.

Ineffective Assistance of Counsel

As he did on appeal, defendant contends in his petition for habeas corpus that he was deprived of due process by the ineffective assistance of his trial counsel. He argues that trial counsel erred in not showing the jury that defendant was not building up anger toward Ookhtens the week before the killing, erred in conceding second degree murder when a viable defense of manslaughter existed, erred in presenting "a token mental state defense to the deliberation element of first degree murder when a wealth of other exculpatory evidence was available," erred in not producing other evidence to refute the prosecution's case, erred in failing to investigate the case. We find no merit in this contention.

Apart from whether trial counsel's representation

"'fell below an objective standard of reasonableness . . . under prevailing professional norms'" (*People* v. *Ledesma, supra,* 43 Cal.3d at p. 216), which we do not find, defendant has failed to establish prejudice. We find there to be no reasonable probability that, but for counsel's alleged errors, a different verdict would have been reached. (*Id.* at pp. 217-218.) None of the exculpatory evidence defendant recites, including evidence of his mental disorder, was reasonably likely to persuade a jury that defendant did not premeditate and deliberate the killing.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GODOY PEREZ, J.

We concur:

GRIGNON, Acting P.J.

ARMSTRONG, J.

COURT OF APPEAL - SECOND DIST.
FILED
APR 9 1999
JOSEPH A. LANE Clerk
Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDRE MIRZAYANCE, Defendant and Appellant.	B116856 (Super. Ct. No. BA122191) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]
In re ALEXANDRE MIRZAYANCE, on Habeas Corpus.	B124764

THE COURT:

IT IS HEREBY ORDERED that the opinion filed in the above matter on March 31, 1999, is hereby modified as follows:

Page 2, delete first paragraph in its entirety and substitute the following in its stead:

Defendant and appellant Alexandre Mirzayance appeals from the judgment entered following a jury trial which resulted in his conviction of the first degree murder of Melanie Ookhtens. He contends: he was denied effective assistance of counsel and due process as a result of his counsel's failure to timely request and the trial court's failure to give instructions regarding a lack of premeditation; the evidence was insufficient to support the finding of premeditation; he was denied effective assistance of counsel by his counsel's "misapprehension of the evidence and demonstrably unfounded argument to the jury"; the trial court erred in precluding a defense expert from describing the materials he relied upon in forming his opinions and in precluding that expert from testifying as to the effect of psychosis on deliberation; and he was deprived of due process by the trial court's acceptance of his withdrawal of his not guilty by reason of insanity (NGI) plea without adequate inquiry as to whether such withdrawal was knowing, intelligent, and voluntary. In a petition for writ of habeas corpus which we have ordered heard concurrently with his appeal, defendant additionally contends: he was denied due process by spectator misconduct occurring at this trial; was denied due process as a result of his unknowing waiver of his NGI plea; and was denied effective assistance of counsel. We affirm the judgment and deny the petition.

[end of modification]

There is no change in the judgment.

GODOY PEREZ, J. GRIGNON, ACT. P.J.

ARMSTRONG, J.

APPENDIX J

SUPREME COURT
FILED
JUL 14 1999
Robert Wandruff Clerk

Deputy

Second Appellate District, Division Five,
No. B116856/B124764
S078671

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

ALEXANDRE MIRZAYANCE, Appellant
IN RE ALEXANDRE MIRZAYANCE ON HABEAS CORPUS

Appellant's petition for review DENIED.

GEORGE
Chief Justice

APPENDIX K

SUPREME COURT
FILED
DEC 1- 1999
Robert Wandruff Clerk

Deputy

S078812

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

In Re ALEXANDRE MIRZAYANCE On Habeas Corpus

Petition for writ of habeas corpus DENIED.

Mosk, J., is of the opinion an order to show cause should issue.

GEORGE
Chief Justice

OPPOSITION BRIEF

FILED
MAY 15 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 07-1315

In the Supreme Court of the United States

Michael Knowles, Warden, California Department of Corrections and Rehabilitation,

Petitioner,

v.

Alex Mirzayance,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent urges the Court to deny petitioner's petition for certiorari because the questions presented do not qualify for review under Rule 10(a), Rules of the Supreme Court of the United States, given that the Circuit decision resolved the issues presented by a straightforward application of this Court's Strickland v. Washington, 466 U.S. 668 (1984) jurisprudence.

STATEMENT OF THE CASE

Respondent Alex Mirzayance filed a habeas petition in the Central District of California challenging his state conviction for the murder of his cousin, Melanie Ookhtens. He asserted his trial counsel provided ineffective assistance of counsel in persuading him to waive his only defense, not guilty by reason of insanity (NGI), on the morning the NGI trial was to commence. The defense, which the federal courts found credible and which was amply supported by lay and expert testimony, was abandoned for no benefit to respondent whatsoever.

Defense counsel had no tactical reason at all, much less a rational one for abandoning the insanity defense. Despite vigorously pressing the incompetency of counsel claim in the California appellate courts, neither the Court of Appeal nor the California Supreme Court addressed it in

summarily denying relief. Three separate Ninth Circuit panels have agreed that the insanity defense was strong, with the first panel remanding for an evidentiary hearing on why trial counsel decided to abandon respondent's only defense the morning the insanity trial was to commence. Quoting from U.S. v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996), that first panel wrote: "We have a hard time seeing what kind of strategy, save an ineffective one, could lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood of success, and a defense he specifically stated he had every intention of presenting." Petitioner's Appendix [hereafter "PA"] G-106.

At the evidentiary hearing, defense counsel confirmed both that he had no tactical reason for abandoning the NGI defense and that nothing beneficial accrued to respondent as a result. Respondent proved the bona fides of the NGI defense through the testimony of three experienced forensic psychiatrists and two psychologists. They testified at the evidentiary hearing that respondent, due to a long standing serious mental disease, met the California legal definition of insanity and affirmed that they were prepared to so testify at the NGI trial.

The Magistrate-Judge's Report &

Recommendation [R&R], adopted by the district court, found that these and other "witnesses could have testified credibly and therefore perhaps successfully." PA, F-100. On appeal, the Ninth Circuit panel twice agreed that trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), and affirmed the district court's grant of relief. The State's two requests for a rehearing en banc, after each panel decision, garnered no votes from any active Ninth Circuit judge. PA, A-1; D-1.

STATEMENT OF FACTS[1]

On October 13, 1995, Melanie Ookhtens was a college student at the University of Southern California. Her parents were out of the country on vacation and she and respondent, her younger cousin, planned to pick them up at the airport that night. That afternoon, Melanie's grandmother and aunt went to Melanie's residence to prepare the

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[1] The Petitioner, State of California, does not recite the facts supportive of the panel's two decisions finding trial counsel was ineffective in abandoning respondent's defense. Respondent thus supplements the factual recitation with the facts from the evidentiary hearing which explains and supports the relief granted. Cites to "MER" are to the federal evidentiary hearing found in respondent's excerpts of record filed in the Ninth Circuit. "Trial RT" refers to the state trial proceedings which were exhibits in the federal district court hearing.

house for the parents' return. Respondent had already arrived to meet Melanie. As a family relation, he had been given access to the home.

When the grandmother and her daughter opened the front door, respondent seemed "startled," "[m]aybe he was expecting Melanie, and when he saw us, he got confused." Trial RT 96. The grandmother described respondent as acting quite out of character. He was "following me wherever I was going with the strange walking." Trial RT 97. She found that respondent was acting very "manly" which was "extremely" abnormal for him (id. at 92) as respondent normally was a "quiet, shy person." Id. at 95. The grandmother testified respondent's relationship with his cousin Melanie was very close, like "sister and brother." Trial RT 94.

Respondent's trial attorney, Mr. Wager, testified at the district court evidentiary hearing that his strategies for the guilt trial were to call Dr. Paul Satz, a psychologist, as the sole expert witness at the guilt trial. Dr. Satz conducted thirty psychological and neuropsychological tests, thirteen of which focused on respondent's frontal lobe brain damage, and nine showed evidence of such impairment. Dr. Satz testified he found significant brain damage, "of a congenital form, long-standing, enduring structural defect of the nervous system, of

the brain." Trial RT 467.

Wager did not call any of the other mental state experts who were prepared to testify at the guilt phase that respondent's substantial impairments weighed against the mens rea for first degree murder.

Respondent's friend, Laurent Meira, testified at the guilt phase trial that on the Friday evening of the homicide, respondent picked him up outside his condominium in Pasadena at approximately 8:30 p.m., and "seemed pretty anxious, pretty excited . . . agitated." Trial RT 117. Respondent told him he had shot his cousin in the head and stomach. Trial RT 120-121. Meira suggested that respondent go to the police station and he agreed. Trial RT 123. Respondent stated to Meira he had been carrying his gun since Wednesday because he "felt pretty bad," "that he was followed," and that "someone was after him." Trial RT 149-150.

Attorney Wager testified at the evidentiary hearing that an insanity verdict was "what we were really driving for more than anything else," MER 50, but that the likelihood of success was contingent upon a second-degree murder verdict at the guilt

trial.[2] Wager limited the presentation in support of second degree to Dr. Satz, whose cross examination Wager viewed as an "absolute disaster," MER 49. Wager testified Dr. Satz performed "terribly." MER 89. But Wager made no effort to remedy this. He could have simply called one or more of the other more experienced forensic psychiatrists to testify at the guilt phase trial.

Three very experienced forensic psychiatrists Wager employed did detailed evaluations of respondent and found him legally insane, and they were prepared to testify to it: Dr. Bennett Blum, MER 580; Dr. Ronald Markman, MER 601; Dr. Kaushal Sharma, MER 608. Psychologist Dr. Paul Satz found respondent legally insane as well (MER 87) while psychologist Dr. Richard Romanoff found strong evidence that his "psychotic thought process caused a gross misperception of reality and a consequent potential lack of understanding of the knowledge of wrongfulness of the conduct at the time of the homicide." MER 633.

Wager testified he felt hopeless after the first degree verdict and elected to abandon the insanity defense when Mirzayance's parents purportedly

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[2] This belief was based on an irrefutably erroneous understanding of California law, as is discussed infra. See also PA, B-6, fn. 1.

refused to testify the morning the insanity trial was to begin. MER 57. Mirzayance's parents adamantly denied they refused to testify, MER 174, 296, and their family attorney, James Lund, testified that on the morning of trial Wager did not tell him the parents refused to testify. Rather, Wager told him that Wager believed the parents were in "too much pain" or "anguish" to testify. MER 285. (The magistrate judge found that "[w]hile it therefore may be accurate in a precise, semantic sense to say that the parents never refused to testify, the Court finds that the parents at least expressed clear reluctance to testify, which, in context, conveyed the same sense as refusal." PA, F-72 (emphasis in original).)[3]

Wager made no efforts to regroup in support of the insanity defense. He did not advise the parents to talk to others about testifying even though the mental health experts had previously interviewed the parents and were ready to counsel

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[3] Petitioner argues the Ninth Circuit made a new "factual finding" the parents had not refused to testify. Pet., p. 9. The R&R found only a reluctance and the Circuit rightly held Wager was unreasonable in simply dropping the defense shortly after talking to the parents that Friday morning, the first day of the NGI trial, given the options to go forward that day with witnesses subpoenaed and ready to testify. "Competent counsel would have attempted to persuade them to testify, which counsel here admits he did not." PA, B-7.

them about their concerns. MER 105-106, 111. He never told respondent his parents had purportedly refused to testify, or asked respondent to talk to them about reconsidering. MER 111. He did not discuss with the mental health experts strategies for addressing the parental reluctance to testify. He did not proceed with the expert witnesses subpoenaed for trial that day, thus giving the parents that Friday and the weekend to reconsider.

Wager knew he could proceed with his expert testimony at the NGI trial. MER 99. The experts testified at the hearing that they would have presented their testimony with equal vigor whether or not the parents testified because the parents' information had been incorporated into their opinions from prior interviews. E.g, Dr. Sharma, MER 610-611

Wager's decision to abandon the NGI trial was prompted by an erroneous understanding of California law. See PA, B-6, fn 1. This was his first insanity defense trial. MER 27. He incorrectly believed that the jury's finding of first-degree murder was the functional equivalent of a finding that Mirzayance was legally sane, and that the insanity defense was virtually hopeless for that reason. Laboring under this erroneous belief, the only ray of hope Wager claimed to see was the

possibility of some kind of jury nullification based on sympathy for respondent if his parents testified and wrenched the jurors' hearts: "I saw no sense in proceeding with a defense that had no possibility now of having an emotional portion to it so that the jury could then find in favor of this defendant they had already found guilty of first-degree murder and, whether they knew it or not, under the facts of this case, legally sane. Without the parents, it would be hopeless. That was my feeling at the time." MER 65.

Wager's misunderstanding of California law led to his self-inflicted sense of hopelessness. He erroneously believed the jury's guilt finding of first degree murder was tantamount to a rejection of the insanity defense: "once the jury had found that he had maturely and meaningfully deliberated and premeditated, they had unknowingly decided that he had -- he knew the consequences of his actions and the nature and quality of his actions although they didn't know it.[4] But in order to find, therefore,

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[4] The "maturely and meaningfully" mental elements of first-degree murder were deleted from the California statutory definition of first-degree murder in 1981 in order to remove irrational motivation from the intent elements of murder. See People v. Stress, 205 Cal. App. 3d 1259, 1270-1271 (1988). Thus, the guilt phase jury only had to find intent to kill "formed or arrived at or determined upon as a result of careful thought and weighing considerations for and

(continued...)

that he was insane, he [the jury] would have to in effect disregard their earlier findings." MER 125 (emphasis supplied). His understanding of the law was wrong.

The prosecutor correctly argued to the guilt jury that a finding of insanity and a finding of first degree murder were independent of each other: "Rational plays no part in this particular case because the defendant did not act rationally. That does not negate malice, it does not negate premeditation and deliberation." Trial RT 842-843.[5]

Wager's subjective hopelessness was thus attributable to his misunderstanding of California

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[4](...continued)
against the proposed course of action," which could occur "in a short period of time." Calif. Penal Code § 189. The second and third Circuit opinions noted Wager's fundamental error in understanding the law. He erroneously believed the jury had considered and rejected respondent's mental disease on the wrongfulness-NGI issue when they found guilt on first degree murder. PA, B-6 n. 1; E-27. In reality, they had been instructed by the court and told by the prosecutor those issues were not before them. See Trial RT 853.

[5] The prosecutor also reminded jurors that "sanity is conclusively presumed. You are not dealing with that issue here...." Trial RT 768. "So don't sit back there and argue whether or not he was insane or whether he was sane. That is not yet before you...." Trial RT 769. Further, "[a] finding of deliberation and premeditation is not negated by evidence a defendant's mental condition was abnormal or his perception of reality delusional." Trial RT 844.

law. He clearly recognized that withdrawal of the insanity defense afforded no benefit to respondent whatsoever, but rather doomed him to a mandatory life term in state prison:

> Q. Was there anything Alex [respondent] gained by waiving the N.G.I. trial?
>
> A. [Wager] No. MER 123.

All the subpoenaed mental health experts had substantial forensic experience and were shocked by the abandonment of the insanity defense. As Dr. Bennett Blum testified: "Being informed of the decision to withdraw the insanity plea was a surprise to me given the conclusions reached by myself and other mental health experts regarding Mr. Mirzayance's state of mind. I was not consulted about this decision. In my judgment, based on the data and information available to me, the plea of not guilty by reason of insanity in this case was reasonable and thus my surprise at the announcement of its abrupt withdrawal." MER 553.

Dr. Ronald Markman, a psychiatrist and lawyer, testified he "was not consulted prior to the abrupt withdrawal of the NGI plea which did not make either psychiatric or legal sense. In my judgment, based on the data and information available to me, the plea of not guilty by reason of

insanity was a viable one to present to the jury." MER 589.[6]

Dr. Kaushal Sharma testified he was: "very surprised to learn that the defense withdrew the insanity phase of the trial. I was not consulted about the wisdom of this course ahead of time and I would have questioned it. I would have asked why this was being done and what benefit there was in this course of action after a finding of first-degree murder. In my judgment, if presented to the jury, Alexandre [Mirzayance] had documentary evidence, lay witnesses, and qualified, experienced expert witnesses to support defenses to both premeditated murder and to show insanity at the time of the killing. I have seen mental state defenses put on with far less compelling supportive evidence." MER 610 . The parents' input to him about their son's "mental state and history could have come into evidence through my testimony." Id. at 610-611. (In fact, much of the parents' knowledge about respondent's childhood had already been presented

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[6] Dr. Markman arrived at the courthouse the morning the NGI trial was to begin. When Wager told Dr. Markman he had just waived the NGI trial, Markman immediately responded, "Now, that was a mistake." MER 123. Dr. Markman was highly regarded by Wager as an unbiased doctor with a good reputation. MER 34.

to the jury during the guilt phase through Dr. Satz's testimony, e.g., Trial RT 474, 479; 481.)

Dr. Richard Romanoff testified he found in respondent "substantial evidence of cognitive disorganization and an active thought disorder. In talking to him, I found a lot of his conversation wandered from one topic to another. At times, it was difficult to follow this conversation due to the absence of any logical connection between the thoughts expressed by Mr. Mirzayance. Mr. Mirzayance reported ongoing auditory and visual hallucinations and intense fearfulness and paranoia. He mostly exhibited a blank and affectless expression. Testing provided substantial information about the nature and severity of his psychotic thought process. I concluded that it was ... most likely that this disorganization, confusion, and psychotic process is more pervasive and long standing in nature and not simply a reaction to the recent tragic events that had unfolded. I found that he suffered from a severe and debilitating mental illness." MER 632.

Dr. Sandhu, a specialist in geriatric psychiatry, opined for the prosecution that respondent was not insane, but also that he did not premeditate or deliberate the killing. MER 437. According to his resume, Dr. Sandhu has focused his

career on geriatric psychiatry. He agreed respondent's bizarre behavior at the Ookhten home the afternoon of the homicide "could be somebody who has some paranoia, yes." MER 454. He found "no motive or rationale for the crime," and knew the relationship between Mirzayance and his cousin had been fairly close. MER 450. He agreed that while in jail following his self-surrender, that doctors at the jail "had to determine that he was psychotic in order to get an antipsychotic drug," as respondent was prescribed. MER 446-447.

Dr. Seawright Anderson was the other prosecution psychiatrist. At the federal evidentiary hearing, he was supportive of respondent's insanity defense. Dr. Anderson agreed with virtually all the observations and analysis of the defense experts. MER 412-413. His diagnosis of respondent was schizoaffective bipolar disorder with a history of marijuana and hashish abuse, accompanied by "psychotic episodes most of his life." MER 412. When asked if respondent "at the time he was harming the victim he knew that harming her was wrong," Dr. Anderson testified: "I felt that he felt that he was justified in doing what he was doing because of the psychotic condition he was under. In breaking it down that way, we would say he felt that he was justified in not doing anything wrong

from his interpretation, not from the legal interpretation." MER 418-419. Not understanding wrongfulness at the time of the homicide due to psychosis is legal insanity under the California right/wrong test.

SUMMARY OF ARGUMENT

Following this Court's GVR order for reconsideration in light of Carey v. Musladin, 549 U.S. 70 (2006), the Ninth Circuit correctly considered Carey and applied the 28 U.S.C. § 2254(d) standard to the facts established at the evidentiary hearing. It properly concluded that the state court summary denial of relief was an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984), and Strickland's subsequent IAC decisions in this Court. The Circuit correctly found no valid tactical reason existed for withdrawing the likely meritorious insanity defense. After the decision, Petitioner garnered no votes for rehearing en banc from any Circuit judge.

Petitioner informs this Court that the Circuit "did not analyze whether the state court's adjudication of the claim had been contrary to or an objectively unreasonable application of clearly established federal law...." Pet., p. 13. Wrong. Despite the lack of any state court analysis of the claim, the Circuit nevertheless recognized that the

State's summary denial required a determination of whether "the state court's final resolution of the case was an unreasonable application of clearly established federal law." PA, B-4. Then, the Circuit, assessing the state court record, reviewed the record made at the federal evidentiary hearing, applied this Court's controlling precedent under AEDPA, and properly ruled that the state court's ruling was an unreasonable application of Strickland. Id. at 5.

As will be shown infra, neither Carey, Schriro v. Landrigan, 127 S.Ct. 1933 (2007), nor Wright v. Van Patten, 128 S.Ct. 743 (2008) warrant any other ruling in this case. As the Circuit memorandum recognized, citing this Court's recent pronouncement:

> AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." Carey v. Musladin, 549 U.S.__, __,127 S. Ct. 649, 656, 166 L. Ed. 2d 482 (2006) (KENNEDY, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. 63, 76, 123 S. Ct.

> 1166, 155 L. Ed. 2d 144 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. See, e.g., Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Panetti v. Quarterman, 127 S. Ct. 2842, 2858 (2007). Quoted at PA, B-11.

Strickland set forth the legal framework intended for assessment of counsel's performance. The inevitable variants of the factual contexts necessitates case-by-case application of the rule. "That the Strickland test 'of necessity requires a case-by-case examination of the evidence,' [Citation], obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." Williams v. Taylor, 529 U.S. 362, 391 (2000).

When a habeas petitioner raises IAC, Strickland focuses the analysis to "the proper measure of attorney performance" which remains "reasonableness under prevailing professional norms." Wiggins v. Smith, 539 U.S. 510, 521 (2003),

quoting Strickland at p. 688.

_____The cases primarily relied upon by petitioner are not Strickland performance cases. One involves a situation where there was an interference with counsel's ability to perform as a reasonable advocate. The defendant forbade his defense counsel from presenting a mitigation defense. It was thus held impossible to prove prejudice on habeas review based on defense counsel's alleged lack of a mitigation investigation. Schriro, supra at 127 S. Ct.1944.

In Wright v. Van Patten, supra at 128 S.Ct. 745, the issue was whether the defendant's guilty plea was undermined as a matter of law because his defense counsel participated only telephonically in the guilty plea hearing. There was no issue addressing counsel's actual performance. The lower federal court agreed the defendant could not succeed under the performance prong of Strickland. Rather, the lower court erroneously granted relief to the defendant under a presumed prejudice test, a ruling which had no precedent in this Court, and thus could not be sustained under AEDPA's prohibition.

Both Schiro and Van Patten are distinguishable from this Strickland claim which is a straightforward deficient performance issue. See Williams v. Taylor, 529 U.S. 362, 393 (2000) ("it is

undisputed that Williams had a right -- indeed, a constitutionally protected right -- to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." [Emphasis added].) The decision of the Circuit was correct under AEDPA and this Court's Strickland cases. The State court summary denial of relief was an unreasonable application of Strickland. Petitioner's petition should be denied.

ARGUMENT

1. The Circuit's Holding Correctly Applied 28 U.S.C. § 2254 to an Ineffective Assistance of Counsel Claim for Which Respondent Established Both Deficient Performance and Prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

A. The Decision Complied With the GVR Order to Review the Case in Consideration of Carey v. Musladin 549 U.S. 70 (2006). Petitioner asserts the decision below "improperly disregarded this court's remand order." Pet., 16. A review of the Circuit decision belies this unfounded claim. See PA, pp. 4, 8-9. As the Circuit observes, Carey involved spectator misconduct. This Court found it had never ruled on the impact of private spectator

conduct on the fairness of a criminal trial and had never applied Holbrook v. Flynn, 475 U.S. 560 (1986), to strictly private spectator misconduct. Because no holding of this Court existed to direct the California Court of Appeal's resolution of the defendant's claim, the California decision, by definition, could not have been "contrary to or an unreasonable application of clearly established federal law."

Respondent's case is patently distinguishable because this Court has recognized, at least since 1984, that cases involving defense counsel's inadequate performance are to be reviewed under Strickland's two-pronged legal framework: was the performance unreasonable and was it prejudicial? That is the controlling authority for state courts. Strickland undoubtedly qualifies as the "clearly established Federal law, as determined by the Supreme Court of the United States," within § 2254(d)(1). Wiggins v. Smith, 539 U.S. 510, 521 (2003) ("We established the legal principles that govern claims of ineffective assistance of counsel in Strickland"); see Williams v. Taylor, 529 U.S. 362, 412-413 (2000) (O'Connor, concurring); Rompilla v. Beard, 545 U.S. 374, 380 (2005).

In compliance with Carey, the Circuit rightly found this to be a Strickland case and applied post-

AEDPA rules. Although Petitioner argues the decision is an "extension" of Strickland (Pet., pp. 19, 20, 22), that is not so. As this Court stated in Panetti, quoted supra, that the facts need not be nearly identical for the controlling legal rule to be applied. AEDPA does not forbid a federal court from finding the state's application of a principle unreasonable just because the facts are not the same as in the case in which the principle was announced.

The Circuit found counsel gave unreasonable advice in abandoning his client's only (and viable) defense to the charge, a defense that was ready to go to the jury on the morning counsel abandoned it. While Petitioner appears to claim a pivotal difference is that defense counsel abandoned an affirmative defense (Pet., p. i, 3, 4, 10, 12, 15, 18, 19, 25), it makes no difference under Strickland whether a defense to the elements of the charges or an affirmative defense is at issue. In Hill v. Lockhart, 474 U.S. 52, 58-59 (1985), this Court held that Strickland applied to challenges to guilty pleas, and held "[w]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely

would have succeeded at trial." Hill v. Lockhart, supra at 59-60; italics added.

The decision below was correct that the label on the viable defense withheld is not determinative under Strickland. The fact that this Court has not "specifically addressed a counsel's failure to advance the defendant's only affirmative defense does not carry the day." PA, B-12. It is not the label that controls; it is whether the defense abandoned was a defense to the charges. Defense counsel himself testified the NGI defense was "what we were really driving for more than anything else." MER 50.

B. Schriro v. Landrigan, 127 S.Ct. 1933 (2007) Is an Interference With Counsel's Performance Case. Petitioner also relies on Landrigan to support its position (Pet., p. 17), but fails to acknowledge that this Court categorized it as a special type of case: "Neither Wiggins nor Strickland addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." Id. at 942. There, defendant's own conduct prohibited the presentation of a potential mitigation defense:

> Even assuming the truth of all the facts Landrigan sought to prove at the evidentiary hearing, he still could not be granted federal habeas relief because the state courts' factual

> determination that Landrigan would not have allowed counsel to present any mitigating evidence at sentencing is not an unreasonable determination of the facts under § 2254(d)(2) and the mitigating evidence he seeks to introduce would not have changed the result. In such circumstances, a District Court has discretion to deny an evidentiary hearing. Id. at 1944.

In other words, Landrigan made his determination and required his counsel's adherence to it. This Court held he could not make a Strickland claim under AEDPA because there was no prior Supreme Court case addressing the novel legal issue presented: that of a capital defendant deciding he wanted no mitigation defense, making an in court waiver of his right to present such a defense, and then later prevailing on an ineffective assistance of counsel (IAC) claim based upon trial counsel's failure to conduct an appropriate mitigation investigation.

Because there was no precedent in this Court whether a client's trial choice waiving a mitigation defense could lead, post-conviction, to a Strickland claim for not pursuing it,[7] the state ruling could not

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[7] "In short, at the time of the Arizona postconviction court's (continued...)

be contrary to or an unreasonable interpretation of settled law of this Court.

This case does not involve a client's interference with defense counsel's functioning. Rather, it is the basic question of whether counsel's abandonment of his client's viable and only defense, because of a subjective feeling of "hopelessness," was reasonable. This issue was entirely amenable to resolution under Strickland's settled standard. Indeed, such a failure to advocate the only defense for a defendant and instead to abandon it for no client benefit whatsoever, strikes at the core of the Sixth Amendment's guarantee of the right to effective assistance of counsel.

C. The Decision Does Not Adopt a "Nothing to Lose" Rule. Petitioner argues the decision, in "practical effect," is an application of a "nothing to lose" rule; that is, that it would be ineffective assistance of counsel not to litigate a defense regardless of the merits or strength because the defendant has "nothing to lose." Petition, p. 18.

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[7](continued)
decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish Strickland prejudice based on his counsel's failure to investigate further possible mitigating evidence." Id. at 127 S.Ct. 1942.

Indeed, petitioner further asserts the Circuit applied a "'nothing to lose'" [standard] in place of the clearly established Strickland standard." Pet., p. 23.

The decision says no such thing. The words "nothing to lose" appear nowhere in the decision. PA, B-1-12. It applies Strickland to hold that counsel acted unreasonably when he made the abandonment decision the morning trial was to commence while angry, emotional, and lacking a sense of advocacy. He had a subjective feeling of hopelessness brought on by his failure to understand the critical legal differences between the elements of murder and California NGI.[8] PA, B-6, 7. The latter belief and parental reluctance were the foundation for his abrupt decision to tell his client to give up his only defense.

The fact that respondent had the prospect of substantial gain by going forward with the NGI trial, and without any countervailing downside, was surely a relevant consideration that would necessarily be involved in almost every Strickland

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[8] Wager testified the jury "whether they knew it or not, under the facts of this case, [found respondent] legally sane." MER 65, 125, 145. This is absolutely wrong, yet it formed a basis for his belief the NGI was now "hopeless" and led to the withdrawal decision.

calculus. See e.g., Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001) ("strategic" decision not to investigate held ineffectiveness); Moore v. Johnson, 194 F.3d 586, 615 (5th Cir. 1999) (a strategic decision is one made "on the basis of sound legal reasoning, to yield some benefit or avoid some harm to the defense"); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (ineffectiveness found where counsel "did not choose, strategically or otherwise, to pursue one line of defense over another," but instead, "simply abdicated his responsibility to advocate his client's cause").

The basic flaw in petitioner's position is in mischaracterizing the Circuit decision as a rule that counsel has a duty to present any remotely colorable defense, no matter how implausible, if there is nothing to lose. Notwithstanding petitioner's effort to paint the Circuit decision into that contrived corner, the decision fairly read, states only that counsel has a duty to present a substantial viable defense where there is a prospect for success and no strategic benefit in abandoning it.

As to the issue of prejudice, common sense dictates there must be consideration of the viability of the defense surrendered and whether there was anything strategic in its abandonment. Here, the district court and R&R concluded the defense NGI

witnesses "could have testified credibly and therefore perhaps successfully – even though subject to strong cross-examination...." PA, F-100. The Circuit also found prejudice in that there was a reasonable probability, one sufficient to undermine confidence in the outcome, that the jury would have found respondent insane. PA, B-8.

This was a straightforward application of Strickland's legal framework to the facts of the case. Contrary to Petitioner's claims, no new legal rule or extension of the law was pronounced.[9] See Pet., p. 19.

D. Advancing the Client's Interest is the Essence of Sixth Amendment Effective Assistance. Strickland, argues petitioner, does not require an attorney to always advance potentially meritorious affirmative defenses. Pet., p. 19. The decision below did not so hold. Of course, one or more potentially meritorious defenses may be sacrificed for some potential benefit, but not surrendered for no reason at all. This Court's decision in Jones v. Barnes, 463 U.S. 745 (1983), cited at Pet., p. 20, makes the point. There, a defendant requested several issues be argued by his appellate counsel.

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[9] A fortiori, there was no Teague v. Lane, 489 U.S. 288 (1989) retroactivity issue. See Pet., p. 19.

Counsel exercised his own discretion and argued three of the seven issues as the strongest arguments for relief. All of the issues were before the appeal court. Jones upheld a strategic choice to argue the strongest issues without abandoning others: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752.

Arguing all the claims was not required. Jones stands for the non-controversial proposition that counsel's reasoned choice to argue stronger defenses as opposed to marginal ones is effective assistance of counsel. It does not stand for the proposition that counsel may simply abandon all of a client's potentially meritorious defenses for no justifiable reason.[10]

Petitioner's reliance on Jones v. Page, 76 F.3d 831, 843-844 (7th Cir.1996) is misplaced. Jones found counsel's investigation and rejection of an insanity defense to be reasonable. Counsel found no

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[10] E.g., Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997) (counsel "did not present any mitigating evidence because he did not think that it would do any good. However, [because witnesses]...were available and willing to testify on his behalf, this reasoning does not reflect a strategic decision, but rather an abdication of advocacy.")

evidence supporting it. He had consulted with a mental health professional who had been seeing Jones and who opined there was no basis for an insanity inquiry. The IAC claim was ultimately resolved for lack of prejudice. In post-plea evaluations, Jones was found sane. He thus had no evidence to support his claim.[11]

In Evitts v. Lucey, 469 U.S. 387, 394 (1985), cited at Pet., 20, a grant of habeas relief was upheld based on trial counsel's failure to perfect the initiation of defendant's appeal. This Court held counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim."

E. Reasonable Performance Involves Efforts at Beneficial Advocacy for the Client. This Court has held that "even when there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." United States

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[11] In an apparent effort to construct a cert-worthy issue, Petitioner meritlessly claims Jones "directly conflicts" with the case at bar. Pet., 20. The cases are so grossly distinguishable, there is nothing remotely close to a conflict. Jones found no IAC in counsel's not pursuing a defense that had no evidentiary support, whereas here, counsel gave up a defense that had a phalanx of psychiatrists lined up to testify in its support supported by lay witness testimony.

v. Cronic, 466 U.S. 648, 657 (1984). This statement is premised on the assumption that advocacy is involved in making such consequential decisions; that is, a guilty plea may provide more benefit to the client than going to trial even with a colorable defense. Cronic cited other cases where giving up of a potential bona fide defense came in exchange for a benefit: e.g., Parker v. North Carolina, 397 U.S. 790 (1970) (where the client risked a capital sentence, there was no IAC in advising the defendant to forgo motions, pleaded guilty to charges leading to a life sentence); McMann v. Richardson, 397 U.S. 759, 762 (1970) (three defendants pleaded guilty to lesser offenses than charged; held, not IAC to not pursue the question of the voluntariness of their confessions); compare Brady v. United States, 397 U.S. 742 (1970) (upholding a guilty plea that was a voluntary and intelligent choice among the alternatives available to a defendant); see also Bordenkircher v. Hayes, 434 U.S. 357, 363-365 (1978) (plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial).

In Florida v. Nixon, 543 U.S. 175, 191-192 (2004), counsel conceded his client's guilt as a tactic to avoid the death penalty without the client's explicit consent. This Court held the conduct within

the realm of reasonable performance because pursuing a strategy of challenging the prosecution's case, when the evidence of guilt was overwhelming, could destroy chances to save the client's life at sentencing. Thus, defense counsel cannot be deemed ineffective for being candid and not engaging in "a useless charade," when saving his best arguments for the sentencing phase. There was no IAC because the concessions were made for a strategic benefit.[12]

Wiggins, supra, noted that defense counsel elected not to present mitigation evidence at sentencing and chose "to pursue an alternate strategy instead." Ibid. But even that tactical choice was found unreasonable. Here, there was no alternative strategy whatsoever. Counsel just gave up the one and only perfectly good defense for no countervailing benefit as opposed to "making an informed choice among possible defenses." Id. at 525.

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[12] See also Bell v. Cone, 535 U.S. 685, 701-702 (2002) (unreasonable for the Tennessee Court of Appeals to deem counsel's choice to waive argument a non-tactical decision given there was a tactical upside for the client in not doing so); Yarborough v. Gentry, 540 U.S. 1 (2003) (no IAC stemming from an underwhelming final argument by defense counsel; deemed reasonable because "[f]ocusing on a small number of key points may be more persuasive than a shotgun approach." Id. at 7.)

In each of these cases, important rights were given up based on counsel's strategic decision that a reasonable expectation of a benefit would come in return. Here, counsel admitted there was no benefit. He just gave up the defense during an emotional, angry time while laboring under fundamental misconceptions about California law. That is not reasonable performance under any assessment. For "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975), quoted in U.S. v. Cronic, supra at 655.

2. The Circuit Correctly Applied AEDPA's Standard of Review to Find the State's Summary Denial an Unreasonable Application of Strickland.

Despite the Petitioner's argument to the contrary, the Circuit both recognized and applied the habeas review standard under AEDPA, 28 U.S.C. § 2254(d)(1). See Pet., pp. 21-26. First, where petitioner spends a page discussing state law rules on summary denials of petitions (Pet., 21-22), the Circuit states it in one line: "Where, as here, the

state court has provided an adjudication on the merits...." PA, B-4. Petitioner criticizes the Circuit for not "analyzing the state courts' adjudication pursuant to § 2254(d)." Pet., p. 22. But the Circuit explicitly acknowledges it must give "an independent review of the record to determine whether the state court's final resolution of the case was an unreasonable application of clearly established federal law." PA, B-4. In addition, it reviewed the federal evidentiary hearing to conclude the state court's denial of relief was "contrary to or an unreasonable application of clearly established Federal Law." PA, B-5.

Petitioner contends the Circuit never explained how the state court summary denial was an unreasonable application of Strickland. Pet., p. 22. This is a confounding assertion given that the decision explains that the purpose of the federal evidentiary hearing was to resolve conflicting evidence on why counsel waived the defense, a necessary step given the failure of the state courts to hold a hearing. Further, the decision explains why defense counsel's decision was ineffective, i.e., that the state decision upholding the conviction was an unreasonable application of Strickland. It then reassessed the whole case under Carey v. Musladin as per the order of this Court. PA, B 5-12.

Petitioner argues the state record "reasonably supports the conclusion that counsel's challenged decision was not prejudicial under the second prong of the Strickland standard." Pet., p. 23. Then, petitioner argues the case facts, and particularly the consciousness of guilt facts as contrary to a reasonable likelihood of a different outcome such as to undermine judicial confidence. Pet., p. 24-25.

However, the Circuit recognized that each of the respondent's experts had considered these facts (e.g., Dr. Blum, PA, F-60), and concluded respondent's mental sickness deprived him of the ability to appreciate the wrongfulness of his conduct at the time of the homicide. Indeed, Dr. Anderson, one of the State's two experts testified at the federal hearing and agreed with the defense experts. MER 412-413. He diagnosed respondent with a schizo-affective bipolar disorder with "psychotic episodes most of his life." MER 412. Because of his illness, "I felt that he felt that he was justified in doing what he was doing [during the homicide] because of the psychotic condition he was under." MER 418-419.[13] Further, he explained respondent's post-offense conduct (the conduct indicative of

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[13] The dissent completely misses this point in characterizing Dr. Anderson's opinion as unsupportive of the NGI defense. PA, B-18.

consciousness of guilt) as respondent's "ability to recuperate or recover from a psychotic episode." MER 417.

The Circuit thus was clearly aware of the facts relied upon by petitioner when it conducted its Strickland prejudice analysis.

Defense counsel knew of the purported weaknesses in the defense well before the NGI trial, a trial that he was prepared to go forward with on the very day he abandoned it. Given this, defense counsel's "weakness" rationale is a comment that "resembles more a post-hoc rationalization of counsel's conduct than an accurate description" of his thinking (Wiggins, supra at 526-527), and "a mistaken memory shaped by the passage of time." Id. at 533.[14]

Many issues in contested cases contain weaknesses. But here, the consensus of the lay testimony and expert opinions (save for the State's geriatric expert, Dr. Sandhu), supported an NGI

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[14] Also, contrary to Pet. 27-28, there was no expert who would have been called at trial to be impeached with altered notes involving another case, because Wager testified, "I don't think I was going to call [him]." MER 56.

finding, and was, at a minimum, sufficiently strong to undermine judicial confidence in the outcome.[15]

Wager's concern that the defense needed the parent's contribution about respondent's childhood was met by Dr. Satz's testimony at the guilt phase. Dr. Satz recounted the parents' history regarding respondent including that he had subnormal intelligence, an extremely low self concept, and early experiences with auditory hallucinations. At age 5 or 6, his parents sought professional help for him. His condition became more florid so that by age 14 he was taken to see two psychiatrists. Trial RT 475-476.

As the highly experienced forensic psychiatrists testified at the evidentiary hearing (Dr. Markman, Dr. Blum, Dr. Sharma, and Dr. Romanoff), and as supported by the State's Dr. Anderson, the insanity defense was quite viable, supported by respondent's childhood history of mental problems, his paranoid conduct the week of

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[15] In a futile attempt at judicial nose counting, Petitioner claims 14 state and federal judges have disagreed with the Circuit's decision. Pet., p. 26. Presumably, the number includes the three Circuit panels that voted in favor of respondent's claim. It fails to include, however, that Petitioner's two en banc petitions garnered not a single vote from any of 28 Circuit judges, which, under Petitioner's mode of counting, warranted 56 more votes for respondent.

the homicide, and psychotic break from reality at the time of the homicide. The finding of prejudice under Strickland was proper.

3. The Circuit Did Not Substitute Its Own Fact Finding for that of the District Court.

Petitioner characterizes two conclusions of the district court as fact-finding, and then complains that the Circuit reached a different conclusion. The two issues were properly characterized by the Circuit. Further, they made no difference whatsoever to the finding of prejudicial IAC. Indeed, even the R&R and district court, agreed the abandoned defense was credible and might have succeeded if litigated.

First, the Circuit correctly found that the "reluctance" of the parents to testify the morning of trial was not the functional equivalent of a "refusal." Respondent's father, according to trial counsel, changed his mind, and said he would testify, but then said that he wouldn't. MER 106.[16] As the

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[16] The issue of parental testimony was not central to the issue of IAC for withdrawal of the NGI defense. The parents' statements about their son's mental problems had already come into evidence through Dr. Satz at the guilt trial and would have been repeated by the other defense experts who all interviewed the parents as part of their history taking. The issue of the "refusal" was important only because Wager

(continued...)

Circuit noted, counsel could have responded to the alleged "reluctance" and used any number of approaches to effect a reconsideration. PA, B-7.

The R&R itself stated that the "parents may not have expressly refused to testify, but they expressed a pronounced reluctance to do so, which amounted to the same thing." PA, F-71. The Circuit acknowledged the lower court's factual finding that the parents' expressed reluctance to testify, but did not accept the lower courts' opinion, or inference or conclusion that reluctance meant refusal.

The second complaint by petitioner is that the Circuit did not accept the lower court's characterization that Wager's decision on the morning of trial was well thought-out. See PA, B-7. Whatever the label, the facts accepted by the Circuit were irrefutably established at the hearing: Wager admitted that he decided to abandon the NGI defense as he drove to court the morning of trial. The parental expressed reluctance made him angry, emotional and increased his sense of "hopelessness." Wager could not assure the federal court he was

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[16](...continued)
unreasonably seized upon it that morning as his reason to abandon the defense.

functioning as an advocate[17] for respondent when he advised his client to waive his only defense.

The crux of the Circuit's conclusion was the Wager's decision was "rash" in the sense of "irrational," and this was true whether he spent one, ten or sixty minutes thinking about it that morning before abandoning the NGI trial.

CONCLUSION

Abandoning advocacy and surrendering a defendant's credible and only defense for no benefit is the epitome of ineffective counsel. As stated long ago in the American Bar Association Ethics Opinion 280 (1949), defense counsel is to proceed with objectively viable claims even if counsel has subjective doubts whether the claim will prevail:

> [T]he lawyer...is not an umpire, but an advocate. He is under no duty to refrain from making any proper argument in support of any legal point because he is not convinced of its inherent soundness.... His personal belief in the soundness of his cause or

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[17] "Q. Do you think that morning, given your anger at the parents, you became so emotional that you lost your sense of advocacy? ¶ A. I'm not sure. I'm not sure." MER 124.

> the authorities supporting it is irrelevant.[18]

The record below amply supports the Circuit's holding of prejudicial IAC. There was an unusual and strong consensus among the various mental state experts supporting an NGI finding. Moreover, the near consensus of experts was supported by the corroborating evidence of respondent's childhood psychological problems, his treatment by child psychologists, the parents' history concerning respondent's childhood psychological problems as presented through Dr. Satz, and the lay witness testimony of Laurent Meira and the Ookhtens relatives about respondent's paranoid behavior the week and day of the homicide. All this expert and lay witness evidence presented the likelihood of a different result sufficient to undermine confidence

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[18] See Commentary to §1.2, ABA Standards, The Defense Function, 122-123 (3rd Ed.1993), on counsel's duty to present the client's case: "Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy. Nor can a lawyer be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to compensation or the nature of the appointment."

in the outcome. Rompilla v. Beard, 545 U.S. 374, 379 (2005).

It is respectfully requested that the Petitioner's petition for certiorari be denied.

May 15, 2008 Respectfully submitted,

/s/ Charles M. Sevilla

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REPLY BRIEF

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No. 07-1315

FILED
MAY 29 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner*,

v.

ALEXANDRE MIRZAYANCE, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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IN THE SUPREME COURT OF THE UNITED STATES

No. 07-1315

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner*,

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ALEXANDRE MIRZAYANCE, *Respondent.*

PETITIONER'S REPLY MEMORANDUM

Mirzayance's opposition brief misapprehends the import of this Court's GVR order and subsequent § 2254 decisions. Certiorari should be granted because the reinstated opinion again ignored the threshold and dispositive question under 28 U.S.C. § 2254(d)(1). And as this Court found in *Wright* v. *Van Patten*, 128 S. Ct. 743, 747 (2008) (per curiam), a federal habeas court cannot circumvent *Carey* v. *Musladin* simply by declaring that the general ineffectiveness doctrine of *Strickland* v. *Washington* is "clearly established" law. Nor did the panel majority find ineffectiveness through a "straightforward application" of *Strickland*, as Mirzayance claims. Opp. 24, 27. By announcing that the absence of applicable Supreme Court holdings "does not carry the day" in constraining a federal court's review of a state adjudication, and by granting habeas relief based on its novel and unique "sole defense/nothing to lose" corollary to the *Strickland* test of attorney competence, the Ninth Circuit misconstrued

AEDPA and wrongly extended the *Strickland* principles. Lastly, Mirzayance does not dispute that the record provided the district court with reasonable support for its conclusions of fact, and indeed, the Ninth Circuit never intimated that such findings were "clearly erroneous." Thus, certiorari also should be granted again to correct the Ninth Circuit's departure from the well-settled rules set forth by this Court governing appellate review of district-court factfinding.

1. On the question of the Ninth Circuit's failure to apply 28 U.S.C. § 2254(d), Mirzayance simply observes that the panel majority, as it did in its first vacated opinion, made a prefatory recitation of the § 2254(d) standard. Opp. 32-33. But he again fails to come to grips with the fact that the panel did not adhere to the standard, even while it conceded that "no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense," i.e., the basis of Mirzayance's claim that was raised and rejected in the state courts. Pet. App. 12. First, rather than actually analyze whether the state court decisions had been reasonable, the panel stated it would analyze Mirzayance's claim in light of "the evidentiary hearing held by the district court upon remand." Second, in asserting that a writ must issue under § 2254(d), the panel merely decided the question of error, concluding that counsel's performance was inadequate and that Mirzayance suffered prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984). The reinstated majority opinion once again failed to address the separate question that serves as the dispositive one under AEDPA: whether, wrong or not, the state court decision was nevertheless reasonable. See *Carey* v. *Musladin*, 127 S. Ct. 649, 654 (2006); *Lockyer* v. *Andrade*, 538 U.S. 63, 71, 75 (2003).

Certainly, the panel never articulated how the state courts' adjudication was "objectively unreasonable" under *Strickland*. Thus, as in *Rice* v. *Collins*, "[t]hough it recited the proper standard of review," the Ninth Circuit improperly ignored that standard, and then substituted its evaluation of the federal evidentiary hearing record for the state court's evaluation of the state court's record. *Rice* v. *Collins*, 546 U.S. 333, 342 (2006).

As explained in the petition for certiorari, and as recognized by the dissenting judge following this Court's GVR order and subsequent § 2254 cases, it would not have been "objectively unreasonable" under "clearly established Federal law" for the state courts to decline to apply a per se "sole defense/nothing to lose" corollary to the *Strickland* competent-performance rule that Mirzayance–his denials notwithstanding–presses here. Cf. *United States* v. *Cronic*, 466 U.S. 648, 656-57 n.19 (1984) ("If there is no *bona fide* defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."). And it is not "objectively unreasonable" to conclude that, in any event, withdrawal of the not-guilty-by-reason-of-insanity plea gave rise to no sufficient "probability" of prejudice under the second prong of the *Strickland* standard. Reasonable support for such a conclusion lies in the fact that Mirzayance bore the burden of proof on the insanity issue and that the same jury already had found that Mirzayance had killed with premeditation and deliberation. Perhaps most important, strong evidence of Mirzayance's consciousness of guilt at the time of the murder hopelessly undercut any probability that the jury would nevertheless find that he was "insane" in that he could not tell the difference between right and wrong. See Pet. for Cert. 24-25.

2. Mirzayance asserts the panel majority made a finding of ineffectiveness through a "straightforward

application" of *Strickland*. Opp. 24, 27. But it the reasonableness of the *state* courts' contrary adjudication, not a federal court's own evaluation of attorney performance, that controls. *Musladin*, 127 S. Ct. at 654; and see, *e.g.*, *Van Patten*, 128 S. Ct. at 747, and *Schriro* v. *Landrigan*, 127 S. Ct. 1933 (2007). No holding of this Court requires the States to decide ineffective counsel claims with the "nothing to lose" rule as articulated in *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987), which the panel quoted in its remand order for evidentiary hearing. Mirzayance appears to recognize as much, stressing that "[t]he words 'nothing to lose' appear nowhere" in the post-GVR opinion. Opp. 25. But the fact remains that this was the standard Mirzayance explicitly advanced to the Ninth Circuit, that the panel cited in its remand order (Pet. App. 106), that the district court understandably perceived as "law of the case" that "mandated" relief (Pet. App. 99-100), and that the dissenting judge twice recognized was being applied, wrongly, by the panel (Pet. App. 14, 31-33).

Mirzayance is correct that the panel majority avoided using the words "nothing to lose" in its reinstated opinion. But it merely reworded the phrase, and then employed the "rule" to decide Mirzayance claim in his favor. As the majority phrased it, Wager's decision "secured only the loss of this sole potential advantage," and that "no actual tactical advantage was to be gained from counsel's advice [to not advance an NGI defense]." The majority concluded that "'reasonably effective assistance' would put on the only defense available, especially in a case such as this where there was significant potential for success." Pet. App. 8. Mirzayance takes the same tack in his Brief in Opposition, clinging to the concept while taking pains to use different words. He eschews the district court's "nothing to lose" phrasing, yet asserts the panel's opinion stands for the proposition that an attorney "has a duty to present a

substantial viable defense when there is a *prospect* for success and *no strategic benefit in abandoning it.*" Opp. 26, italics added; see also, *e.g.*, Opp. 25 (arguing Mirzayance "had the *prospect of substantial gain by going forward* with the NGI trial, and *without any countervailing downside*"), italics added.

This wordplay is a vain attempt to dress *Profitt* in sheep's clothing. "Nothing to gain by not proceeding" is indistinguishable from "nothing to lose by proceeding." Thus, the dissenting judge rightly protested that the standard employed by the majority to find ineffectiveness "suggests that to avoid violating *Strickland*, an attorney must always advance any potentially non-futile, colorable, affirmative defense regardless of its questionable merit or arguable chance of success. This is not the standard established by *Strickland* and in fact suggests something more akin to the 'nothing to lose' standard set forth in *Profitt*[.]" Pet. App. 14, 32-33.

However it is phrased, a finding of ineffectiveness on the ground there may have been "no tactical advantage to be gained" by not proceeding (Pet. App. 8) is not "clearly established Federal Law as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1); see *Musladin*, 127 S. Ct. at 654; *Landrigan*, 127 S. Ct. at 1942; *Van Patten*, 128 S. Ct. at 747. Application of *Musladin*, *Landrigan*, and *Van Patten* would have precluded the Ninth Circuit's new extension of the law deeming counsel ineffective for failing to advance such an affirmative defense on the ground that it "might" succeed or is the "only defense available," as the panel majority found in this case. Pet. App. 6, 8. Because no holding of this Court compelled the California Court of Appeal to apply that analysis, let alone decide the matter in Mirzayance's favor, § 2254 bars relief. *Van Patten*, 128 S. Ct. at 747 (quoting *Musladin*, 127 S. Ct. at 654).

3. Even if § 2254(d) as amended by AEDPA did not compel denial of habeas corpus relief on the basis of the objective reasonableness of the state-court decisions alone, Mirzayance is incorrect in proffering his one-sided version of the "facts" for those properly found by the district court and improperly ignored by the Ninth Circuit panel. As explained in the certiorari petition and recognized by the dissenting judge, the district court after an evidentiary hearing resolved the essential factual disputes against Mirzayance. Pet. for Cert. 7-8, 26. Among other findings, the district court concluded: that trial counsel's "decision was carefully considered, not rashly made," after concurrence by "experienced co-counsel"; and that Mirzayance's "parents may not have *expressly refused* to testify, but they expressed a pronounced reluctance to do so, which amounted to the same thing." See Pet. App. 69-76. As explained in the certiorari petition, Pet. for Cert. 26-28, the district court's factual-findings would have compelled the denial of relief, but the Ninth Circuit improperly ignored them in derogation of the "clear error" standard of review.

Mirzayance's "Statement of Facts" is little more than an argument about the credibility of witnesses and the persuasiveness and weight of the evidence. Thus, Mirzayance asserts that his lawyer did not know the legal difference between the mental state for first-degree murder and the mental state for insanity. See Opp. 8-10. But he makes that assertion without the benefit of any finding by either the district court or the Ninth Circuit—and without justification in the record. In addition, Mirzayance argues that the district court's conclusion—that the parents' pronounced reluctance to testify in context conveyed an outright "refusal" to testify and that counsel believed it to be a "'done deal' that any beseeching on his part could not undo," see Pet. App. 69-

76—somehow is not a finding of fact. Opp. 37-38. However incorrect he is in asserting that this was not a factual finding, it is nevertheless noteworthy that Mirzayance does not dispute that the record provided the district court with reasonable support for its conclusion. Nor does Mirzayance dispute that the district court made findings of fact when it concluded that Wager made a "rational, carefully considered, and informed decision the to forgo the insanity defense." Pet. App. 32. If findings of fact at all—and they clearly are—they were binding on the appellate panel, as twice recognized by the dissenting judge.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 28, 2008

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PETITIONER'S BRIEF

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(4)

No. 07-1315

FILED
SEP 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Concluding that defense counsel was ineffective in advising Mirzayance to withdraw his not-guilty-by-reason-of-insanity plea, the Ninth Circuit Court of Appeals granted habeas relief without analyzing the state-court adjudication deferentially under "clearly established" law as required by 28 U.S.C. § 2254(d) and by supplanting the district court's factual findings and credibility determinations with its own, opposite factual findings. This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of *Carey* v. *Musladin*, 127 S. Ct. 649 (2006). On remand, the Ninth Circuit conceded that "no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense" but nonetheless concluded that its original decision was "unaffected" by *Musladin* and subsequent § 2254(d) decisions of this Court.

The questions presented are:

1. Did the Ninth Circuit again exceed its authority under § 2254(d) by granting habeas relief without considering whether the state-court adjudication of the claim was "unreasonable" under "clearly established Federal law" based on its previous conclusion that trial counsel was required to proceed with an affirmative insanity defense because it was the only defense available and despite the absence of a Supreme Court decision addressing the point?

2. May a federal appellate court substitute its own factual findings and credibility determinations for those of a district court without determining whether the district court's findings were "clearly erroneous"?

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OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit, after remand from this Court, is unpublished. The original opinion of the Ninth Circuit and the previous opinions of the district court are unpublished. The opinion of the California Court of Appeal, and the California Supreme Court's order denying habeas corpus relief, are unpublished. Each is reproduced in the appendix to the petition for writ of certiorari.

JURISDICTION

The post-remand opinion of the court of appeals was filed on November 6, 2007. The court of appeals' denial of the Warden's petition for rehearing and suggestion for rehearing en banc was filed on January 17, 2008. Pet. App. A. The petition for writ of certiorari was filed on April 16, 2008, and was granted on June 27, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2. Section 2254 of Title 28 of the United States Code provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

1. *The Crime*

Respondent Mirzayance killed his nineteen-year-old cousin, Melanie Ookhtens, in her family's Los Angeles home on the evening of October 13, 1995. In statements to police detectives made later that night, Mirzayance described what he had done. He said that Melanie became angry when she found him watching television when they were scheduled to meet her parents at the airport. About forty seconds after she had gone to her bedroom, Mirzayance knocked on her door and asked what she was doing. Melanie said she was getting dressed, and told Mirzayance to shut the door. Pet. App. 168; State Clerk's Transcript (CT) 166. Mirzayance entered the bedroom anyway. Melanie told him to "Shut up and shut the door because I'm putting on my clothes." This "pissed off" Mirzayance. He pulled a large hunting knife from his waistband. He approached Melanie as she sat on her bed and stabbed her in the stomach. When she asked why he had stabbed her, Mirzayance stabbed Melanie in the neck. Pet. App. 39-40, 168; State Reporter's Transcript (RT) 193-92; CT 169-71.

Mirzayance further told the police that Melanie had punched and scratched him and screamed for him to "Stop, stop, stop." He said he then drew his .25 caliber laser-sighted pistol from his pocket and shot Melanie once in the stomach and three times in the head from a distance of three feet. When police asked why he used the gun, Mirzayance said, "Because she was fighting back and I had the gun in my pocket, that's why." Pet. App. 39-40, 168; RT 18; CT 172-73, 177.

Immediately after shooting Melanie, he gathered his hunting knife, some of the spent shell casings, and some of his clothes. He turned off the lights to Melanie's room and

returned to his apartment in Pasadena. There, he shed his bloody clothes, showered, and put the stained clothes in a trash bag. Pet. App. 40, 169; RT 276.

A taped message left by Mirzayance on the Ookhtenses' answering machine that evening showed an apparent effort by Mirzayance to concoct a false alibi. In that message, left at 8:07 p.m., Mirzayance stated:

> Melan, it's me. I'm sorry to call you back late. I only want to say that I couldn't make it, I can't make it tonight because, well, Laurent called . . . well, I did not go out with him for a month, so he is like let's go out, because he works on weekends. So, go pick up your parents, say 'hi' to them, drive carefully. But I'll call you guys tomorrow, like in the afternoon, try to see you, or whatever else happens, don't know. Okay? So bye-bye.

Pet. App. 40, 169.

Laurent Meira, a friend of Mirzayance, received an "anxious" and "agitated" phone called from him minutes later. RT 117. Mirzayance drove and picked Meira up around 8:30 p.m. He told Meira that it was no good to be "high" and that he had "messed up big time." Mirzayance told Meira that he had shot Melanie three times in the head and once in the stomach. Mirzayance stopped the car at a Burger King, where he threw the bag containing his bloody clothes into a trash can. Pet. App. 40-41, 169.

Meira suggested he turn himself in. Mirzayance thought for a moment, then agreed and drove to the Pasadena Police Station—after stopping at a 7-Eleven to buy a drink. Pet. App. 411, 170. At the police station, Mirzayance told a Pasadena police sergeant that, about an hour after he had smoked a couple of "hashish" cigarettes, he had argued with his cousin, followed her upstairs to her bedroom, shot her, and killed her. Pet. App. 41, 170; RT 127. He said that he had been angry with Melanie for hanging up on him the

day before. Mirzayance said that he had bought the gun five to six weeks earlier and that he had carried it in his pocket for the three days before the killing. He said he carried the hunting knife only on the day he killed Melanie.

When police asked why he stabbed and shot Melanie, Mirzayance responded, "Because she was getting too much, was causing too much bad stuff on me when I did nothing; that's why. And for the fact I was on the drugs, I didn't think what I was doing." A urine sample taken from Mirzayance four hours after the murder, however, tested negative for recent use of marijuana or hashish. Pet. App. 41, 171; CT 169.

Police retrieved the knife, gun, and a box of .25 caliber ammunition from Mirzayance's car, and a .25 caliber shell casing from his pocket. Officers also recovered the trash bag containing Mirzayance's bloody clothes from the Burger King dumpster. Pet. App. 41, 170.

The post-mortem analysis confirmed that Melanie had died of three gunshots to the head and one to the abdomen, and nine stab wounds, including two to the chest. Any of the four gunshot wounds, and two of the stab wounds, would have been fatal. The gunshot wounds to Melanie's temple were consistent with Mirzayance standing over her and shooting her in the head as she sat on the bed. The gunshot wound to the top of the skull was consistent with Mirzayance having stood over her and shooting her in the back of the head as she lay on the floor. Pet. App. 40, 169; RT 428.

2. *State Court Proceedings*

Mirzayance was charged with first degree murder. He entered pleas of not guilty and not guilty by reason of insanity (NGI). Under California law, such pleas result in a bifurcated trial. In the first phase, the jury renders a verdict solely on the question of guilt. If the jury finds the

defendant guilty, a second phase occurs in which the jury determines whether the defendant has proven by a preponderance of the evidence that he was not sane at the time of the offense. Cal. Penal Code § 1026. To prevail at this second phase, the defendant must prove that—regardless of whether he suffered from a mental disease or disability—he either could not appreciate the nature and quality of his actions at the time he committed the crime or could not appreciate the wrongfulness of those actions. Cal. Penal Code § 25(b); *People* v. *Skinner*, 704 P.2d 752, 763-65 (Cal. 1985).[1]

One of Mirzayance's two trial lawyers, Donald Wager, sought to obtain a guilt-phase verdict of only second degree murder—a level of culpability that he conceded to the jury—and thereafter to secure an NGI verdict. In support of this defense strategy, Wager retained eight expert doctors to evaluate Mirzayance's mental health. He also retained jury consultants, conducted a mock trial in which he presented mental health defenses to two juries, hired a private investigator to interview friends and associates of Mirzayance and Melanie Oohktens, and consulted with Mirzayance's parents and their personal attorneys, James and Eric Lund. Evidentiary Hearing Exhibit (Ex.) 6 at 12 (Decl. of Dr. Vicary); Ex. 9 at 2-3, 21-34 (Work Schedule).

Wager defended against the charge of first degree murder primarily with the testimony of psychologist Paul Satz, Ph.D., the Chief of the Neuropsychiatric Practice at the Neuropsychiatric Institute at the UCLA School of Medicine, who had examined Mirzayance on four occasions and conducted thirty psychological tests on him. Pet. App. 171. Wager's strategy was to save the testimony of other

---

1. Here, as discussed below, only the latter question was at issue, for no one has opined that Mirzayance failed to appreciate the nature and quality of his actions.

retained mental health experts for the sanity phase. Pet. App. 50. Dr. Satz opined that Mirzayance had "suffered from a combination of long-standing serious psychological problems, intellectual limitations, and probable brain damage." Mirzayance told Satz that his intelligence was subnormal, that he had always been a failure, and that he was unable to socialize because it was too frightening. Mirzayance said he had his first auditory hallucination when he was five years old. The voice spoke in French and sounded like a thirty-year-old man. It told him to steal from his parents, to steal candy, and to think bad thoughts, and Mirzayance felt compelled to obey. Pet. App. 171-73.

Mirzayance also told Dr. Satz that he was depressed, isolated, and withdrawn, he had been ridiculed, and he had once taunted a peer with a knife, which led to increased alienation. He told Satz that he began to hallucinate and felt he was being threatened three days before he killed Melanie. Mirzayance told Satz that the day before the killing, he was frightened when he saw spiders and a cat sitting on his stomach. Mirzayance went into his bedroom and put the knife and gun under his pillow for protection. Pet. App. 172.

Dr. Satz opined that Mirzayance might have suffered from a paranoid delusional disorder, that he probably suffered from psychosis most of his life, and that he had a psychotic break at the time of the killing. According to the doctor, a person suffering from such disorders would not understand why they committed a murder. Pet. App. 173.

Wager argued to the jury that Mirzayance had no motive to kill Melanie, and that he acted without premeditation and deliberation due to his mental disease. *Id.* The jury, however, returned a verdict of premeditated and deliberate first degree murder. Mirzayance's parents then informed Wager that they would not testify at a sanity phase. Ex. 15 at 3. Wager, after conferring with a retained expert

doctor, the parents, their personal attorney, and co-counsel Lawrence Boyle, reasoned that under the facts of the case, that "practically, factually, and legally, we could not successfully proceed with the insanity defense . . . ." *Id.* Wager then advised Mirzayance to withdraw the NGI plea. Mirzayance did so and was sentenced to prison for twenty-nine years to life.

In state habeas corpus proceedings, Mirzayance claimed that Wager had rendered ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984), for advising him to withdraw the NGI plea. Mirzayance argued that an NGI defense would have been strong and that Wager had withdrawn it for no tactical reason or benefit. Mirzayance submitted twenty-five declarations, including those from defense expert doctors, a "*Strickland* expert," a defense investigator, co-counsel Boyle, Mirzayance's parents, their personal attorneys, Mirzayance's childhood teachers in France, and several of Mirzayance's friends. Four psychiatrists and one psychologist stated in declarations that they had been prepared to testify that Mirzayance met the legal definition of insanity. They opined that Mirzayance suffered from a mental illness that prevented him from premeditating and deliberating the killing and from understanding the wrongfulness of his conduct. Exs. 1, 2, 4 & 6. The California Court of Appeal and the California Supreme Court summarily denied the claim on the merits. Pet. App. I & J.

3. *Federal Habeas Corpus Proceedings*

a. Mirzayance raised the same ineffective-counsel claim in a federal habeas petition, and presented the same documentary evidence and declarations he had submitted to the state courts. The district court denied relief, concluding that the state-court decisions were "neither contrary to nor an unreasonable application of federal law

28 U.S.C. § 2254(d)." As the district court explained:

> Given that the jury rejected Dr. Satz's [guilt-phase expert opinion] that [Mirzayance's] mental impairments deprived him of the ability to perform the more demanding tasks of deliberating and planning a murder, defense counsel reasonably predicted that this same jury would find plaintiff fully capable of discerning right from wrong and would, therefore, reject the proffered insanity defense. Defense counsel, who knew what he had to present during the insanity defense portion of the trial, made an informed decision that he did not have sufficient evidence to cause this jury to change its mind. Having concluded that there was no chance of success on the insanity defense, counsel advised his client to waive the defense and accept the sentence of the court.
>
> . . .
>
> Accordingly, on this record, counsel's strategic decision to recommend the withdrawal of the insanity defense, made after consultation with [Mirzayance], was not an unreasonable one, and does not constitute ineffective assistance of counsel.

Pet. App. 153-54.

b. Mirzayance appealed. Concluding that "[t]he record presents conflicting reasons for the abandonment of the insanity defense," a Ninth Circuit panel remanded the case to the district court to conduct an evidentiary hearing. Pet. App. 106, 115-16. The panel noted that a hearing would "assist in determining whether there were tactical reasons for abandoning the insanity defense or if the withdrawal of the defense was a wholesale abandonment of the one viable and strong defense Mirzayance had." Pet. App. 108.

c. Following a four-day evidentiary hearing, the district court resolved the overall factual issues against Mirzayance. It found that the jury's verdict—that the

murder was "willful, premeditated, and deliberate"—signaled the failure of the defense's strategy of seeking a verdict no worse than *second* degree murder and then securing an NGI verdict. The court found that nevertheless, Wager remained willing to proceed with a sanity phase despite his assessment that it now had little chance of success in light of the jury's mental-state findings. Wager believed, however, that any remaining chance of securing an NGI verdict depended on presenting some "emotional impact" testimony by Mirzayance's parents, "which Wager had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase." Pet. App. 42, 48, 51. But, just before the sanity phase was to begin, Mirzayance's parents and their lawyer—to Wager's surprise—made it clear that they would not testify.

The district court determined that Wager, although angry, reasonably concluded that the parents' refusal to testify was a "done deal" and "one that any beseeching on his part could not undo." Pet. App. 71-76. Wager's NGI strategy had become "impossible to attempt." Wager was left with four experts, all of whom held an opinion—that Mirzayance did not premeditate and deliberate his crime—that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof.

The district court further found that, before making a final decision, Wager had consulted with "experienced co-counsel," who concurred in Wager's recommendation that Mirzayance withdraw the NGI plea. Co-counsel Boyle believed that evidence of Mirzayance's past hallucinations could come in only through the parents' testimony, Pet. App. 71; and Mirzayance had consistently refused to testify. See Ex. 15 at 3.

The district court also found that Wager understood the law and what he needed to prove in a sanity phase, that he "carefully weighed his options before making his decision final," and that he had "made a rational choice to forgo the insanity defense." His decision was "carefully considered," "not rashly made," and "appeared to be reasonable to him and his co-counsel, in light of the guilt phase verdicts and the parents' statements to him on the way to court that morning." Pet. App. 68-71.

Crediting counsel's decision as competent, the district court opined that, under the deferential standard of review required by 28 U.S.C. § 2254(d), the state-court adjudication of the claim did not result from an unreasonable application of *Strickland*. The court also stated that its opinion would be the same even under de novo review of the record as expanded in federal court. Pet. App. 97-98.

Despite its factual and legal conclusions, however, the district court ultimately granted the writ because, in its view, the Ninth Circuit's remand order was a "mandate" that "destined [Mirzayance] to relief." The district court noted that the remand order cited the pre-AEDPA[2] case of *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987), an ineffective-counsel case in which the Fifth Circuit had observed that it could see "no advantage" in a trial counsel's decision to bypass an insanity defense. Pet. App. 97-98. The district court inferred that the "'nothing to lose' rule pronounced in *Profitt*" was the "substantive law of the case." Thus, the district court explained, the function of the ordered evidentiary hearing was simply to determine, de novo, "whether, in fact, Petitioner had nothing to lose." Because there was nothing that Mirzayance "*gained* by waiving the NGI trial," the district court said it was

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2. The Antiterrorism and Effective Death Penalty Act of 1996.

"bound" to find that counsel had "nothing to lose," and that his performance was therefore necessarily deficient under *Profitt*. Pet. App. 98-100 (italics added). Given the perceived mandate, the district court "reluctantly" granted relief. Pet. App. 35-37, 98-100.

d. The Warden appealed, arguing that the state-court adjudication was reasonable and therefore conclusive under § 2254(d)(1). A Ninth Circuit panel affirmed. In an unpublished 2-to-1 opinion, the panel first asserted that the district court had erred in inferring any mandate for relief from the remand order. The majority, however, did not implement the ruling denying relief that the district court stated it would have issued absent the perceived mandate. Rather, the majority affirmed the granting of the writ, "albeit on different grounds."

The panel majority replaced the district court's "key" factual findings with its own opposite findings. It found (1) that Wager had acted "rashly," and (2) that Mirzayance's parents had not refused to testify. Pet. App. 28. In light of these new factual findings, the majority asserted that "'reasonably effective assistance' would put on the only defense available, especially in a case such as this where there was significant potential for success." Pet. App. 29. The majority stated that, in light of the available defense expert opinions, there was a "reasonable probability" "that the jury would have found Mirzayance insane." *Id.* The majority did not discuss the contrary opinions reached by the two court-appointed experts—that Mirzayance was sane when he committed the crime. The majority also did not address the state courts' denial of the claim, or explain how under § 2254(d) the state-court adjudication was an unreasonable application of clearly established federal law.

In the dissenting judge's view, the majority failed to defer to the district court's well-founded "explicit factual findings." Moreover, the majority's opinion erroneously

"suggest[ed] that to avoid violating *Strickland*, an attorney must always advance any potentially non-futile, colorable, affirmative defense regardless of its questionable merit or arguable chance of success. This is not the standard established by *Strickland* and in fact suggests something more akin to the 'nothing to lose' standard set forth in *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987)." Pet. App. 31-34.

4. *United States Supreme Court Proceedings*

When the court of appeals declined to rehear the case en banc, Pet. App. 23, the Warden petitioned this Court for certiorari. While the petition for certiorari was pending, this Court decided *Carey* v. *Musladin*, 127 S. Ct. 649 (2006). In *Musladin*, this Court reversed a Ninth Circuit grant of habeas relief premised on the circuit court's conclusion that the defendant suffered inherent prejudice when courtroom spectators wore buttons depicting the murder victim. However, because of "the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here" and because "[n]o holding of this Court required" the states to apply the test for government-sponsored courtroom practices to spectators' courtroom conduct, this Court held that the Ninth Circuit violated § 2254(d) when it granted relief on Musladin's claim. *Id.* at 652. Several weeks later, this Court granted the Warden's petition for certiorari, vacated the judgment, and remanded this case for further consideration in light of *Musladin*. Pet. App. 22.

5. *Post-Remand Proceedings In The Ninth Circuit*

The Ninth Circuit ordered supplemental briefing from the parties on "the possible relevance of *Musladin* as well as *Schriro* v. *Landrigan*." Pet. App. 4. In *Landrigan*, 127

S. Ct. 1933 (2007), this Court had reversed a Ninth Circuit decision granting habeas relief to an Arizona prisoner on grounds that his trial counsel was ineffective under *Strickland* for failing to conduct further investigation into mitigating circumstances in a capital case, notwithstanding the defendant's instruction not to present such evidence. Applying § 2245(d), this Court emphasized that "we have never addressed a situation like this." 127 S. Ct. at 1942.

On November 6, 2007, a divided Ninth Circuit panel reinstated its original decision. The majority declared that "our decision is *unaffected* by *Musladin* or *Landrigan*, and we therefore again affirm the grant of habeas corpus." Pet. App. 4 (italics added). The majority asserted that "the fact that no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense does not carry the day . . . ." Pet. App. 12. The panel majority stated that *Strickland* "required here that counsel assert the only defense available, especially given the significant potential for success." Pet. App. 8, 12. Once again, the opinion did not analyze the state-court adjudication under the deferential-review standard of § 2254(d)(1). The dissenting judge found that the decision did not comport with *Musladin* or AEDPA, and he again protested "the majority's independent review of the record *without regard* to the lower court's factual and credibility findings made after a four-day evidentiary hearing." Pet. App. 13-21 (italics added).

The Warden filed a petition for rehearing and suggestion for rehearing en banc. While the Warden's petition for rehearing was pending, this Court decided *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam). In *Van Patten*, as in the instant case, this Court had vacated a grant of habeas relief and remanded for further consideration in light of *Musladin*; and, as in this case, the court of appeals had adhered to its prior ineffective-counsel ruling granting

relief despite § 2254(d)(1). This Court then summarily reversed that decision. The Warden notified the Ninth Circuit of the *Van Patten* decision. But the court of appeals declined to rehear the case. Pet. App. 1.

SUMMARY OF ARGUMENT

Trial counsel Wager represented a defendant who had armed himself with a gun and a knife, waited for his chance to strike, and murdered a defenseless teenage girl as she sat on her bed because—in his words—she made him "pissed off." Then, as he acknowledged, he promptly cleaned up after the crime, hid the incriminating ballistic and blood evidence, and concocted a false alibi. And, when he finally turned himself in and confessed, he told police that he felt "very guilty, very bad . . . for what I've done." Finally, at trial, a jury rejected the defense testimony of a preeminent mental-health expert, and determined that the defendant had murdered his victim "willfully," "deliberately," and with "premeditation."

It would strain credulity to agree with Mirzayance's assertion that Wager—faced with all of that—then acted incompetently when he passed up a last but nevertheless doomed opportunity to prove to that same jury that his client somehow could not have know his actions were "wrong." Even more to the point, under 28 U.S.C. § 2254(d), it was indefensible for the Ninth Circuit to override the state court's ruling—one that was, at the very least, "reasonable"—that Wager's well-informed and thoughtful decision could not be condemned as unconstitutionally ineffective. The Ninth Circuit has failed to adhere to this Court's order to reconsider its ruling under the strict criteria of § 2254(d), and this Court now should reverse the judgment outright.

1. Under § 2254(d)(1), federal courts "shall not" grant habeas relief with respect to any claim adjudicated on the

merits in State court unless the adjudication resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" A state court's adjudication does not result in a decision contrary to clearly established Federal law unless the state court either "applies a rule that contradicts the governing law set forth in [this Court's] cases," *Williams* v. *Taylor*, 529 U.S. 362, 405 (2000), or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent," *id.* at 406. In *Carey* v. *Musladin*, 127 S. Ct. 649 (2006), this Court made it clear that, unless a "holding of this Court require[s]" a state court to apply a Supreme Court-established test to a set of facts, "the state court's decision [is] not contrary to or an unreasonable application of clearly established federal law." *Id.* at 654.

The Ninth Circuit flouted these principles—and this Court's remand order—by declaring its original, vacated decision to be "*unaffected*" by *Musladin* and this Court's subsequent § 2254(d) decisions. It erroneously applied a novel "nothing to lose" test for ineffective counsel, one never adopted by this Court in its *Strickland* cases, granting relief and condemning counsel for declining to advance an affirmative defense that "might" have succeeded as the "only defense available"—and did so even while acknowledging that "*no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense.*" Pet. App. 4, 6, 8 (italics added).

The panel failed to review deferentially either the state-court adjudication or trial counsel's challenged decision—let alone engage in the "double deference" this Court prescribes for claims such as Mirzayance's. See *Yarborough* v. *Gentry*, 540 U.S. 1, 5 (2003) (per curiam),

and *Musladin*, 127 S. Ct. at 654. Nothing in the opinion addresses the dispositive § 2254(d) question of whether the state-court decision was at least reasonable under clearly established law. *Yarborough* v. *Alvarado*, 541 U.S. 562, 666 (2004); *Lockyer* v. *Andrade*, 538 U.S. 63, 71, 75 (2003); see *Van Patten*, 128 S. Ct. at 747. As in *Rice* v. *Collins*, 546 U.S. 333, 342 (2006), "[t]hough it recited the proper standard of review," at the outset of its reinstated opinion, the Ninth Circuit improperly ignored that standard, and then substituted its de novo evaluation of a federal evidentiary hearing record for the state court's evaluation of the state court's record.

Under proper application of § 2254(d), the state-court adjudication of Mirzayance's ineffective-counsel claim is conclusive because it was neither "contrary to" nor an "unreasonable application" of the two-pronged "deficient performance" and "probable prejudice" standard set out by this Court in *Strickland* v. *Washington*—the "clearly established Federal law" that governs this case. See *Williams*, 529 U.S. at 405. The California Supreme Court was free to apply the general *Strickland* test for assessing performance and probable prejudice. It was not compelled by this Court's holdings to adopt the panel majority's novel "nothing to lose/sole defense" corollary to *Strickland* in Mirzayance's favor in assessing the withdrawal of the "affirmative defense" of insanity. This Court's decisions do not support, let alone "clearly establish," such a test. In fact, the Ninth Circuit panel conceded that neither *Strickland* nor any other holding of this Court has held that an attorney rendered constitutionally deficient performance under the Federal Constitution by deciding, after full investigation, not to pursue an affirmative state-law defense. Nor has this Court ever held that a defense attorney must advance such a defense if it is "the only defense available" and "might" succeed, as the panel

majority ultimately declared in this case. Pet. App. 6, 8. The novel rule sought by Mirzayance and employed by the majority was a prohibited extension of the general *Strickland* rule to something beyond the matrix established by this Court's holdings, and thus is not "clearly established law." *Musladin*, 127 S. Ct. at 654.

2. Besides erring under AEDPA in extending the *Strickland* rule at all, the panel majority extended it in untenable ways. The extension of *Strickland* employed in this case cannot be reconciled with this Court's teaching that counsel does not perform deficiently by making an informed decision to forgo a bona fide defense, *United States* v. *Cronic*, 466 U.S. 648, 656, n.19 (1984), or a non-frivolous argument, *Jones* v. *Barnes*, 463 U.S. 745, 751-54 (1983). Such a rule would also derogate from *Strickland* as an impractical bright-line rule. Attorneys have never been obligated to advance all nonfrivolous claims or defenses or arguments, all of which might at least theoretically succeed and thus benefit their clients. See *Jones*, 463 U.S. at 751-54; *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985). And any constitutional rule requiring attorneys to set aside their professional judgment and to instead pursue theories of advocacy under a "sole defense/nothing to lose" standard would flatly conflict with, and be more restrictive than, the ethical guidelines and rules of professional conduct set forth by the American Bar Association.

3. Under *Strickland*, it was objectively reasonable for the California Supreme Court to deny Mirzayance's claim for lack of prejudice. Even if Mirzayance's parents and experts would have testified as alleged in his state habeas petitions—that Mirzayance did not know killing Melanie was wrong because he was acting on the paranoid delusion that he needed to defend himself—their testimony met two virtually insurmountable obstacles. First, the proffered expert opinions could not persuasively be reconciled with

the jury's own determination of Mirzayance's mental state at the time of the crime. The jury had previously rejected Dr. Satz's extensive guilt-phase testimony for the defense that Mirzayance's mental impairments prevented him from the more demanding tasks of deliberating and planning a murder. In addition, there was strong evidence in the state-court record of Mirzayance's obvious consciousness of guilt. Mirzayance went to great lengths to conceal his involvement in the murder, and he engaged in goal-oriented behavior including immediately collecting the knife and spent shell casings, showering, disposing of his bloody clothes, and concocting a false alibi on Melanie's answering machine. Further, he explicitly acknowledged the wrongfulness of his actions by telling his friend hours later that he "messed up big time" by killing Melanie, and, shortly after turning himself in, told police detectives that "I did *a murder*." Mirzayance further told the police that he felt "very guilty, very bad . . . for what I've done." And, as Mirzayance later admitted to a court-appointed doctor in a report that was introduced at the evidentiary hearing, he felt his actions "were wrong at [the] time of [the] present offense."

In addition, under a traditional understanding of *Strickland*, the California Supreme Court's denial of the claim was objectively reasonable on "performance" grounds. The state-court record shows that defense counsel Wager's considered decision, approved by Mirzayance and made after consultation with co-counsel and a thorough investigation, was a "reasonable choice" under difficult circumstances. Wager was a highly experienced defense attorney who was well versed in mental health and sanity issues, and who made the challenged decision only after extensive investigation far exceeding what the Constitution requires. He engaged in extensive expert shopping, ultimately retaining eight

expert doctors to evaluate Mirzayance's mental health. He retained jury consultants, conducted a mock trial in which he presented mental health defenses to two juries, hired a private investigator to interview friends and associates of Mirzayance and Melanie Oohktens, and consulted regularly with Mirzayance's parents and their personal attorneys. He reevaluated the case following the jury's unfavorable verdict, and discussed the case with a retained expert doctor and co-counsel before making a final decision. The state-court record fully supports a conclusion that Wager's considered decision was reasonable under prevailing professional norms. The California Supreme Court was entitled to conclude, under this Court's precedent, that Wager's decision was made upon "thorough investigation" and thus "virtually unchallengeable." *Strickland*, 466 U.S. at 690-91.

4. In any event—even if the Ninth Circuit somehow were allowed to dispense with deferential review and rely on a federal evidentiary hearing at all—the panel majority wrongly ignored the district court's findings of fact, which confirmed that Wager did *not* render ineffective assistance and thus bolstered the correctness of the state-court adjudication. Rather than abide by the district court's findings that Wager's decision was rational, carefully considered, and ultimately reasonable given the parents' refusal to testify, it improperly reweighed the evidence. It then supplanted the "key" factual and credibility determinations with its own opposite findings, including that Wager acted "rashly," and that the parents—whom Wager deemed to be the "linchpin" to any remaining chance of success—had *not* refused to testify. This approach ignored the strict § 2254(d) limits on habeas relief for claims adjudicated on their merits in state court. Moreover, the approach contravened the fundamental principle of appellate review that a federal appellate court

must assess a district court's factual findings under the "clearly erroneous" standard of review. The district court's factual findings—which fully support the correctness and the reasonableness of the state-court decision on either prong of *Strickland*—are well supported by the record, and the panel majority was wrong to overrule them.

"Fairminded jurists" considering Mirzayance's claim under *Strickland* could have reached a conclusion different from that of the divided Ninth Circuit panel. See *Alvarado*, 541 U.S. at 666. Indeed, at least *fourteen* state and federal judges so far have disagreed with the panel majority's view. The state courts had great leeway in determining Mirzayance's claim, and their rejection of the claim was owed "doubly-deferential" review. *Id.* at 664; *Gentry*, 540 U.S. at 5. The state-court adjudication was reasonable and therefore conclusive under § 2254(d).

ARGUMENT

THE STATE-COURT REJECTION OF MIRZAYANCE'S INEFFECTIVE-COUNSEL CLAIM WAS CONCLUSIVE BECAUSE IT WAS NEITHER CONTRARY TO NOR AN UNREASONABLE APPLICATION OF THIS COURT'S CLEARLY-ESTABLISHED *STRICKLAND* RULE

The state-court adjudication of Mirzayance's claim was conclusive under § 2254(d) because it was neither contrary to nor an unreasonable application of this Court's clearly established law. Mirzayance is not entitled, under § 2254(d), to the benefit of any "nothing to lose" extension of ineffective-counsel law beyond that recognized by this Court in *Strickland* v. *Washington*, and the Ninth Circuit was wrong to grant relief on the basis of such a view of the law. Under the terms of *Strickland*, the California Supreme Court's rejection of Mirzayance's claim was justified on grounds of lack of prejudice. It is reasonable

to conclude that the NGI plea would have failed in light of the jury's earlier finding that Mirzayance premeditated and deliberated the murder and the strong evidence of his consciousness of guilt. In addition, the California Supreme Court's denial of the claim was also objectively reasonable under *Strickland* on "performance" grounds. The state-court record shows that Wager's considered decision, which was approved by Mirzayance and made after consultation with co-counsel and a thorough investigation, was a "reasonable choice" under difficult circumstances. In any event, the district court's findings of fact were binding on the Ninth Circuit and they support only one conclusion: Mirzayance's ineffective-counsel claim is meritless.

A. The State-Court Adjudication Of This Claim May Not Be Deemed Contrary To Or An Unreasonable Application Of This Court's Clearly Established Law For Declining To Apply The Panel Majority's Novel Extension Of This Court's *Strickland* Rule

1. *Habeas Relief In This Case Was Erroneously Premised Upon A New "Sole Defense/Nothing To Lose" Corollary To This Court's General* Strickland *Standard*

As the dissenting judge and the district court recognized, relief could be granted in this case only by resorting to a novel "nothing to lose" rule for assessing counsel's performance under the Sixth Amendment. Pet. App. 14, 32-33, 96-100. To obtain relief under the facts of this case, Mirzayance would need the benefit of a new bright-line rule that, to render effective assistance under *Strickland*, attorneys must always present any available affirmative defense—regardless of their professional judgment as to its merits—if it is the only defense available, it is non-futile, and there is nothing to lose by proceeding (or nothing to gain by not proceeding).

Mirzayance persuaded the Ninth Circuit to employ such a rule. After the state and district courts rejected his claim, he argued to the Ninth Circuit that "defense counsel was *obligated to present the insanity defense*," stressing that it was "his *only defense*," and that it was withdrawn for "*no tactical advantage*." Appellant's Opening Brief (case 01-56869) (AOB) 38, 40 (italics added). As his principal authority, he cited the grant of habeas relief for failure to present an insanity defense in *Profitt* v. *Waldron*, 831 F.2d 1245, 1259 (5th Cir. 1987), and quoted the appellate court's statement, "'we simply can see *no advantage* in the decision to bypass the insanity defense.'" AOB 40 (quoting *Profitt*, 831 F.2d at 1259) (italics added). He also invoked the Ninth Circuit's own similar comments in two pre-AEDPA direct appeal cases. See *id.* (quoting *United States* v. *Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) ("We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's *only defense*, a defense that had a strong likelihood of success, and a defense that he specifically stated he had every intention of presenting."), and *United States* v. *Clabourne*, 64 F.3d 1373, 1385-86 (9th Cir. 1995) ("noting that counsel had '*nothing to lose*' in presenting penalty phase expert testimony") (italics added).

The Ninth Circuit's original opinion adopted these "tests" wholesale, repeating verbatim the quotations from *Profitt* and *Span* in remanding the case for an evidentiary hearing. Pet. App. 106. Despite recognizing that the state-court adjudication was reasonable under *Strickland*, the district court perceived that the Ninth Circuit required it to impose a "nothing to lose" rule instead. As the district court explained, "The remand opinion mandates that the applicable *substantive* law by which this Court must judge the remanded claim is the 'nothing to lose' rule pronounced in *Profitt*." Pet. App. 35-37, 99. "Bound by those

matters . . . this Court must find that [Mirzayance] had nothing to lose, and therefore that Wager's performance was deficient." *Id.*

It is true that, when the Warden appealed, the Ninth Circuit disclaimed reliance on its explicit citation to *Profitt*'s "nothing to lose" language. Pet. App. 26. But the majority in fact used that test once again to gauge whether Wager's performance met the constitutional minima. This time, dressing the "nothing to lose" rule in sheep's clothing, the majority simply inverted the phrase. It asserted that Wager's decision "secured only the loss of this *sole potential advantage*," and that "[n]o actual tactical advantage was to be gained from counsel's advice." Having satisfied itself that Wager had nothing to gain by not proceeding, i.e., nothing to lose by proceeding, the panel majority concluded that "'[r]easonably effective assistance' would put on the *only defense available*, especially in a case such as this where there was significant potential for success." Pet. App. 8 (italics added).

The dissenting judge rightly protested that "This is *not* the standard established by *Strickland* and in fact suggests something more akin to the '*nothing to lose*' standard set forth in *Profitt* . . . ." Pet. App. 31-34 (italics added). Indeed, the panel never attempted to explain how the defense expert opinions of insanity—if weighed against the court-appointed expert opinions findings sanity and the jury's finding of premeditation and deliberation—reasonably would have made a difference in a sanity phase. And a mere "potential" for an NGI verdict such as that contemplated by the panel (Pet. App. 8) is not a "reasonable probability" that the jury would have found Mirzayance had met his burden of proof. See *Strickler* v. *Greene*, 527 U.S. 263, 291 (1999) ("reasonable *possibility*" of a different result is a lesser showing than "reasonable *probability*" that a jury would have reached a different

verdict had it considered other evidence). Nor did the panel explain why prevailing professional norms would *obligate* a minimally competent attorney to proceed with an affirmative defense such as NGI simply because it is the "only defense available" or because a jury "*might* be persuaded that [a defendant] was in fact insane." See Pet. App. 6, 8 (italics added). However phrased, the grant of habeas relief in fact depended on a novel standard that, despite the panel's perfunctory citation to *Strickland*, cannot be reconciled with this Court's *Strickland* decisions.

This Court, of course, took the extraordinary measure of granting certiorari, vacating the opinion, and remanding it for reconsideration in light of *Musladin*. The panel majority, however, reinstated its analysis unchanged: despite this Court's order, it declared over another dissent that its analysis was "unaffected" by *Musladin* or its progeny. Pet. App. 4. But under AEDPA as interpreted in cases such as *Musladin*—and under *Strickland* too—the majority's resort to its "nothing to lose" rule was erroneous.

2. *This Court's Cases Do Not Support, Let Alone "Clearly Establish" A "Nothing To Lose" Test For Evaluating Counsel's Effectiveness*

Under § 2254(d), habeas corpus relief may not be granted to Mirzayance on the ground that the California courts' adjudication his claim does not accord with the Ninth Circuit's novel "sole defense/nothing to lose" test. For this Court has never "clearly established" such a novel—if not ill-advised or radical—standard of attorney practice. Cf. *Musladin*, 127 S. Ct. at 651. In fact, neither *Strickland* nor any other case from this Court has held that an attorney renders constitutionally deficient performance under the Federal Constitution by deciding, after full investigation, not to pursue an affirmative state-law

defense. Nor has this Court ever held that a defense attorney must advance such a defense if it is "the only defense available" and "might" succeed, as the panel majority ultimately declared in this case. Pet. App. 6, 8. Rather than recognize a per se rule of effectiveness, this Court instead has explained "that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477, 479 (2000). The Ninth Circuit's "sole defense/nothing to lose" standard cannot be reconciled with this Court's teaching that counsel does not perform deficiently by making an informed decision to forgo a bona fide defense, *United States* v. *Cronic*, 466 U.S. 648, 656, n.19 (1984), or a non-frivolous argument, *Jones* v. *Barnes*, 463 U.S. 745, 751-54 (1983). Applying such a novel rule to grant habeas relief in this case violated AEDPA because no such rule has been clearly established by this Court. See *Gray* v. *Netherland*, 518 U.S. 152, 166 (1996) ("Only the adoption of a new constitutional rule could establish [the] propositions" sought by the habeas petitioner.).

Despite the panel majority's assertion that review of this case is "unaffected" by it, *Musladin* illustrates that granting relief under an intermediate appellate court's "nothing to lose" rule runs afoul of AEDPA's "clearly established Federal law" limitation. The issue in *Musladin* "was the significance of [this Court's] precedents in a case under § 2254." *Van Patten*, 128 S. Ct. at 745. The Ninth Circuit granted Musladin relief by concluding that it violated due process for the murder victim's family to wear buttons displaying the victim's image in the courtroom. *Musladin*, 127 S. Ct. at 651-52. Reversing, this Court explained that it had never squarely addressed the issue presented. *Id.* at 653-54. This Court gave a tightly circumscribed reading to its prior opinions as governing potential prejudice from "state-sponsored courtroom

practices." Drawing a distinction between state actors and private ones, this Court recognized that "the effect on a defendant's fair-trial rights" of "*spectator* conduct . . . is an open question in our jurisprudence." *Id.* at 653-54 (italics added). It therefore concluded that "[n]o holding of this Court" compelled the state courts to apply its prior courtroom-conduct cases to the defendant's claim, and thus that the state-court decision was not "contrary to or an unreasonable application of clearly established federal law." *Id.* at 654. As applicable here, *Musladin* precludes a grant of habeas relief premised on a condemnation of counsel for failing to advance an affirmative defense because it "might" have been persuasive or was the "only defense available." Pet. App. 6, 8. Because no holding of this Court compelled the California Courts to apply that analysis, let alone decide the matter in Mirzayance's favor, § 2254 bars relief. *Musladin*, 127 S. Ct. at 654.

Schriro v. *Landrigan* further demonstrates that federal habeas courts must defer to state courts deciding ineffective-counsel claims when no Supreme Court holding addresses the category of challenged attorney conduct. See 127 S. Ct. at 1942. In granting relief in *Landrigan*, the Ninth Circuit found counsel ineffective for failing to conduct further investigation into mitigating circumstances in a capital case, even though the defendant had instructed counsel not to present such evidence. Reversing, this Court faulted the Ninth Circuit for misinterpreting *Rompilla* v. *Beard*, 545 U.S. 374 (2005), a case in which this Court had found counsel ineffective under *Strickland* for failing to investigate and present mitigating evidence. In both cases, the defendants had refused to assist in, and to some extent had interfered with, the development of a mitigation case. *Rompilla*, 545 U.S. at 380; *Landrigan*, 127 S. Ct. at 1937-38, 1943. But in *Landrigan* the defendant took a more active role, by "inform[ing] the court" that he

did not want mitigating evidence presented. The *Landrigan* Court pointedly observed, "we have never addressed a situation like this." 127 S. Ct. at 1942. It therefore held that it was not objectively unreasonable under clearly established law for the state court to decide that Landrigan could not establish *Strickland* prejudice. *Id.*

This Court limited the scope of "clearly established law" even further in *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam). The Seventh Circuit, following a *Musladin* GVR, reinstated its earlier decision granting habeas relief on a claim that trial counsel was ineffective for appearing at a hearing by speakerphone. As in the instant case, the circuit court brushed aside the *Musladin* GVR as having no effect on its prior decision. This Court summarily reversed, explaining that none of its previous holdings had "squarely addresse[d]" such an ineffective-assistance claim. This Court concluded, "Because our cases give no *clear answer* to the question presented, let alone one in Van Patten's favor, 'it cannot be said that the state court unreasonably applied clearly established Federal law.' Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized." *Id.* at 747 (quoting *Musladin*, 127 S. Ct. at 654) (italics added and punctuation omitted).

These cases demonstrate precisely what the Ninth Circuit panel ignored: that "clearly established Federal law" is limited to holdings of this Court from cases where the facts are similar to the case *sub judice*. See, *e.g.*, *Landrigan*, 127 S. Ct. at 1942. In contrast to the Ninth Circuit here, several other circuits quickly grasped the import of *Musladin*. See, *e.g.*, *Rodriguez* v. *Miller*, 499 F.3d 136 (2d Cir. 2007) (denying habeas relief following a *Musladin* GVR); *House* v. *Hatch*, 527 F.3d 1010 (10th Cir. 2008) (recognizing that post-*Musladin*, the absence of a Supreme Court case at least similar to the case *sub judice*

means there is no "clearly established" law under § 2254(d)).

Ironically, the panel majority employed the very *absence* of direct Supreme Court holdings to justify its grant of habeas relief. Partially quoting *Panetti* v. *Quartermain*, 127 S. Ct. 2842, 2858 (2007), the majority said that AEDPA does not "'require state and federal courts to wait for some nearly identical fact pattern before a legal rule must be applied,'" and does not "'prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced."'" Pet. App. 11. But the panel majority ignored the next and most important sentence, which explained: "These principles guide a reviewing court that is faced, as we are here, with *a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling.*" *Panetti*, 127 S. Ct. at 2858 (italics added). In this case, however, the extensive record considered by the state courts can, under *many* reasonable interpretations, support the state-court adjudication. Rather than undertake a deferential inquiry such as that described in *Panetti*, the panel majority shrugged off the absence of applicable Supreme Court holdings as "not carry[ing] the day" under § 2254(d), and instead announced that its prior, vacated grant of relief was proper "especially in light of *Panetti*." Pet. App. 4, 11.

The panel majority's approach turns AEDPA on its head. Under § 2254(d), the absence of a Supreme Court holding that "squarely addresses" an issue or gives the state courts a "clear answer" to the question presented *does* "carry the day." Without such a holding, "it cannot be said that the state court unreasonably applied clearly established Federal law." *Van Patten*, 128 S. Ct. at 747. The Ninth Circuit saw *Panetti* as somehow justifying de

novo review when the facts of a state case can be distinguished from this Court's precedent. But *Panetti* did no such thing. *Panetti* simply explained that under § 2254(d): (1) a Supreme Court holding may "clearly establish" a principle that will govern later cases with different facts; and (2) even a general rule can be applied in an unreasonable manner. See *Panetti*, 127 S. Ct. at 2858 (citing *Williams*, 529 U.S. at 362). But *Panetti* nonetheless emphasized what the Ninth Circuit disregarded: that the dispositive inquiry under § 2254(d) is whether a state-court decision can be "reconciled with any reasonable application of the controlling standard" set forth in by this Court. *Id.* Contrary to the majority's view, because *Strickland* is a general test, a federal habeas court owes *greater* deference to a state adjudication, not less. As this Court instructed the Ninth Circuit in another case defining § 2254(d) deference:

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. *The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.*

Alvarado, 541 U.S. at 664 (observing that, in a *Miranda* claim challenged under § 2254(d), "fairminded jurists" could disagree with whether the defendant was in custody) (italics added); see also *Landrigan*, 127 S. Ct. at 1942; *Gentry*, 540 U.S. at 5 (*Strickland* mandates "doubly deferential" judicial review under AEDPA).

In contrast, if a general rule such as the *Strickland* test must be modified or extended before it can apply to the facts at hand under § 2254(d), then that extension cannot have been "clearly established" at the time of a state-court decision. See *Alvarado*, 541 U.S. at 666. The "sole

defense/nothing to lose" rule sought by Mirzayance and employed by the majority was just this type of prohibited extension of a general rule. As the dissenting judge aptly stated, the "law" applied by the Ninth Circuit panel to overturn the decision by the California courts "is *not* the standard established by *Strickland* and in fact suggests something more akin to the 'nothing to lose' standard set forth in *Profitt* . . . ." Pet. App. 31-34 (italics added). The California Supreme Court was not compelled by this Court's holdings to adopt such a test when deciding Mirzayance's claim, let alone to resolve the claim in his favor.

3. *A "Nothing To Lose" Test Would Be An Untenable Departure From Existing Sixth Amendment Jurisprudence And Would Create An Unworkable Standard Of Practice For Attorneys*

Besides erring under AEDPA in extending the *Strickland* rule at all, the panel majority extended it in untenable ways. The court of appeals' "sole defense/nothing to lose" corollary to *Strickland* apparently would require that attorneys always advance any potentially meritorious affirmative defense. Until this case, advancing an affirmative defense, including a state-law-created affirmative defense such as NGI, on the ground that it "might" succeed or is the "only defense available," had never been treated as a requirement of the Sixth Amendment. Attorneys have never been obligated to advance all nonfrivolous claims or defenses or arguments, all of which might at least theoretically succeed and thus benefit their clients. See *Jones*, 463 U.S. at 751-54 (appellate counsel has no constitutional duty to raise every nonfrivolous issue requested by a defendant); *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985) (same). Even when there *is* a bona fide defense, "counsel may still advise his client

to plead guilty if that advice falls within the range of reasonable competence under the circumstances." *Cronic*, 466 U.S. at 656, n.19; cf. *Landrigan*, 127 S. Ct. at 1942.

A "sole defense/nothing to lose" test would also derogate from *Strickland* as an impractical bright-line rule. An attorney's decision may be informed and reasonable, and therefore not deficient under *Strickland*, even where there may be "nothing to lose" (or gain) by choosing differently. Under the panel majority's test, however, defense attorneys would be required to set aside their informed judgment as to the appropriateness of a defense. Instead, they would be *constitutionally compelled* to advance any and all affirmative defenses—including those that they determined were inappropriate or had little or no chance of success—as long as a defendant had "nothing to lose" by proceeding. Such a rule could compel attorneys to make any number of non-futile objections, motions, arguments, etc., in case a post-conviction attorney claiming ineffectiveness of trial counsel succeeds in convincing the federal court there was no harm to the defendant in trying. Such an unthinking and indiscriminate approach to litigation would waste scarce judicial resources and certainly raise ethical questions. It would be, in any event, a radical departure from traditional Sixth Amendment jurisprudence. This Court has "consistently declined to impose mechanical rules on counsel—*even when those rules might lead to better representation . . . .*" *Flores-Ortega*, 528 U.S. at 481 (italics added); and see, *e.g.*, *id.* at 478 (rejecting as inconsistent with *Strickland* a "bright-line rule" obligating counsel to file a notice of appeal unless instructed otherwise by a defendant).

Other circuit courts of appeals have rejected the "sole defense/nothing to lose" test enforced by the panel majority in this case. As the Seventh Circuit has stated:

We refuse to hold that [counsel's] prudent, good-faith

> decision to forego an insanity defense (after investigation) constitutes ineffective assistance of counsel. Implicit in such a holding would be the notion that in order to represent a criminal defendant competently, an attorney must not only pursue each and every possible psychiatric defense, but perhaps also search out and present questionable "expert" testimony in support of such arguments. A holding of this kind would defy common sense and contradict well-established case law . . . .

Jones v. *Page*, 76 F.3d 831, 843 (7th Cir. 1996); see also, *e.g.*, *Cepulonis* v. *Ponte*, 699 F.2d 573, 575 (1st Cir. 1983) ("[C]ounsel need not chase wild factual geese when it appears, in light of informed professional judgment, that a defense is implausible or insubstantial as a matter of law, or, as here, as a matter of fact and of the realities of proof, procedure, and trial tactics.").

A rule requiring attorneys to pursue theories of advocacy under a "sole defense/nothing to lose" would also conflict with guidelines set forth by the American Bar Association (ABA). While the ABA standards require more than the minimal level of competence contemplated by the Sixth Amendment, see *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003), the "nothing to lose" rule as applied in this case would set a constitutional standard that exceeds even that of the professional organization. For example, the ABA's Model Rules of Professional Conduct dictate that an attorney should advance only "meritorious claims and contentions," and only when an attorney determines he or she can make "good faith arguments in support of their clients' positions." MODEL RULES OF PROF'L CONDUCT R. 3.1 (Comment 2002). The Annotation points out that lawyers have been disciplined for pursuing claims after it became clear that no basis for the claims existed. *Id.* at Annotation. Moreover, ABA Standard for Criminal Justice

4-5.1 requires an attorney to advise the accused as follows: "After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome." But the ABA Standards further state that the "ultimate decision" on key matters such as "what pleas to enter" is *not* for the attorney, but must "be made by the accused after full consultation." ABA Standards for Criminal Justice 4-5.2(a).

Here, the district court determined that Wager, after careful consideration, extensive investigation, and consultation with "experienced co-counsel," rationally and reasonably concluded that he had no basis to proceed with an affirmative NGI defense. Pet. App. 68-70. He advised Mirzayance of his recommendation to withdraw the NGI plea, and Mirzayance concurred and personally withdrew it. Wager's decision comported with both *Strickland* and the ABA guidelines—just not with the Ninth Circuit's untenable standard. The Ninth Circuit's novel test would supplant the standard in Model Rule 3.1—to advance only meritorious claims when a well-informed lawyer determines they may be argued in good faith—with a requirement that all lawyers must advance any non-futile argument if there is "nothing to lose."

A "sole defense/nothing to lose" test would further conflict with a lawyer's duty of candor to the tribunal, which encompasses the duty to advance only meritorious claims that the attorney, after reasonable inquiry, determines have evidentiary support. See FRCP Rule 11[3]:

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3. FRCP Rule 11 states, in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or

MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002). These principles are correctly applied when a well-informed attorney, after thorough investigation, declines to advance motions or defenses that he has assessed as inappropriate or as having little or no chance of success. They would be rendered meaningless by a bright-line rule requiring that attorneys advance motions or affirmative defenses whenever it is their client's "sole defense" and there would be "nothing to lose." Such a rule would wrongly reduce the adversarial process to mere gamesmanship.

B. The California Courts Correctly And Reasonably Rejected Mirzayance's Claim Under *Strickland*

Regardless of whether the Ninth Circuit consciously or explicitly applied a "nothing to lose"-type rule, Mirzayance's claim for relief inevitably depends on such a rule, for it could not succeed under the "doubly-deferential" *Strickland* analysis prescribed by this Court's jurisprudence. Under proper application of AEDPA, however, the state-court adjudication of Mirzayance's claim

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> unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
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> . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [and]
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

is conclusive, for the California Supreme Court's rejection of the claim was reasonable under *Strickland*, the "clearly established Federal law" at the time it decided the claim. *Williams*, 529 U.S. at 405. To prevail under *Strickland*, a defendant must show both that counsel's conduct fell below an objective standard of reasonableness, and that the defendant was probably prejudiced by counsel's acts or omissions. *Strickland*, 466 U.S. at 687; accord *Bell* v. *Cone*, 535 U.S. 685, 695 (2002); *Williams*, 529 U.S. at 390. As a habeas corpus petitioner, moreover, Mirzayance also had to show that the state courts' rejection of this claim was "not only erroneous, but objectively unreasonable." *Gentry*, 540 U.S. at 4 (citing *Wiggins*, 539 U.S. at 511, *Woodford* v. *Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam), and *Williams*, 529 U.S. at 410). As this Court has emphasized, review of *Strickland* claims under AEDPA must be "highly deferential—and doubly deferential when it is conducted through the lens of federal habeas." *Id.*

Here, the California Court of Appeal and California Supreme Court summarily resolved Mirzayance's ineffective-assistance claim on the merits. Pet. App. I & J; *see Hunter* v. *Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992). In summarily adjudicating such a claim, the California Supreme Court provisionally assumes that petitioner's allegations of historic facts are true, but concludes that the allegations nevertheless do not make out a prima facie case for relief. See *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993). Under the evidence presented to it in this case, the state-court adjudication was well within the matrix of this Court's *Strickland* decisions. Indeed, as noted earlier, this Court has never found ineffective assistance of trial counsel for "reasonable choices" made after a full investigation. See *Flores-Ortega*, 528 U.S. at 477; *Gentry*, 540 U.S. at 5; cf. *Wiggins*, 539 U.S. at 523.

The state-court adjudication "was supported by the record." Cf. *Gentry*, 540 U.S. at 4. The claim-defining factual allegations and supporting evidence considered by the federal courts had been presented to the state courts in the form of voluminous declarations from Wager, co-counsel Boyle, the defense mental health experts, the defense investigators, a "*Strickland* expert," Mirzayance's parents, the family's attorneys James and Eric Lund, Mirzayance's childhood teachers in France, and several of Mirzayance's friends. See, *e.g.*, Exs. 1-22. The direct testimony of the key witnesses[4] at the federal evidentiary hearing consisted of the same declarations filed in state court. And although Wager provided a more detailed explanation at the hearing of his thought-process, the additional details were consistent with his state-court declaration. Cf. *Lambert* v. *Blodgett*, 393 F.3d 943, 970 (9th Cir. 2004) (district court's failure to defer to the state court adjudication was especially inappropriate where federal evidentiary hearing uncovered little new evidence, and the district court's findings relied on testimony that also had been presented to the state courts). Moreover, none of the facts upon which the state court could have relied were contradicted at the federal evidentiary hearing. In light of the state court record, and under the requisite "doubly-deferential" review, it would not be unreasonable for a state court to conclude that Mirzayance had failed to establish either one or both of the two requisite prongs—deficient performance and prejudice—of a constitutional claim under *Strickland*.

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4. These witnesses consisted of defense counsel Wager, Mirzayance's parents, their attorney James Lund, and the defense mental health experts.

1. *The State-Court Rejection Of The Claim Was Reasonable In Light Of Mirzayance's Inadequate Showing Of "Prejudice."*

Relief is unavailable under § 2254(d)(1) because the state-court adjudication of Mirzayance's claim was at least "reasonable" under *Strickland* in light of his unpersuasive showing of "prejudice." The prejudice prong of the *Strickland* test placed on Mirzayance a burden—and in this case an insurmountable one—to show that "there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding* would have been different." *Williams*, 529 U.S. at 391 (italics added). And, as *Strickland* explained, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." 466 U.S. at 697.

In his previous "prejudice" arguments in this case, Mirzayance has incorrectly conflated the entering of a plea of guilty based on poor legal advice, as occurred in *Hill* v. *Lockhart*, 474 U.S. 52 (1985), with the withdrawal of an affirmative defense such as NGI based on poor legal advice. Contending that *Hill* controls, he has argued that he need only show a reasonable probability that he would not have withdrawn his insanity plea but for Wager's allegedly poor advice. See Pet. App. 84-86. His argument is flawed in several respects. Unlike a *Hill* guilty plea that admits the elements of an offense, a California defendant's NGI plea does not directly gainsay his alleged guilt but rather invokes an affirmative defense. See generally *Martin* v. *Ohio*, 480 U.S. 288 (1987); *Patterson* v. *New York*, 432 U.S. 197 (1977). Unlike guilt, which the State must prove beyond reasonable doubt, a California defendant bears the burden to prove insanity by a preponderance of the evidence. See Cal. Penal Code § 25(b); *People* v. *Hernandez*, 994 P.2d 354, 359 (Cal. 2000)

("Sanity proceedings do not constitute an *action*. Insanity is a plea raising an *affirmative defense* to a criminal charge, [albeit] one that does not negative an element of the offense.") (original italics).

No decision of this Court has squarely addressed what constitutes "prejudice" in the context of a challenge to a decision to forgo such an affirmative defense, and whether it differs from a consideration, in *Strickland* terms, of the likelihood that the ultimate result of the trial would have been different. Nor has this Court extended *Hill* to a withdrawal of a state-law-based affirmative-defense plea, cf. *Gilmore* v. *Taylor*, 508 U.S. 333, 343 (1993) (distinguishing due-process instructional law on elements of crime from that of affirmative defenses), let alone "clearly established" that courts must apply a type of per se prejudice rule to incompetence in this category of attorney performance. As in *Van Patten*, no decision of this Court "clearly establishes" an ineffective-counsel prejudice rule more strict than that of considering the likelihood that the defendant otherwise would have obtained of a more favorable ultimate "result." *Van Patten*, 128 S. Ct. at 746 (no decision of this Court clearly establishes that *Cronic*'s per se ineffectiveness standard should replace *Strickland*'s two-pronged inquiry in reviewing counsel's participation by speaker phone). Even if it were indisputable that Mirzayance in fact would have adhered to his NGI plea but for counsel's advice to withdraw it, then, it still would follow that the state-court adjudication did not run afoul of "clearly established law" in light of his inadequate showing that an NGI plea would have succeeded. See *Musladin*, 127 S. Ct. at 65. As a consensus of circuit courts reasonably suggests, "prejudice" under this scenario means demonstrating a reasonable probability that the jury otherwise would have found Mirzayance not guilty by reason of insanity. See,

e.g., *United States* v. *Cox*, 826 F.2d 1518, 1525-26 (6th Cir. 1987); *Profitt*, 831 F.2d at 1250-51; *Weekley* v. *Jones*, 76 F.3d 1459, 1462 (8th Cir. 1996); *Weeks* v. *Jones*, 26 F.3d 1030, 1038 (11th Cir. 1994).

And, at the very least, the federal habeas court must grant the state courts wide latitude in applying *Strickland*'s general prejudice test to the question of whether Mirzayance's NGI proof would have prevailed. *Alvarado*, 541 U.S. at 664. To prevail on an insanity claim under California law, the defendant must prove by a preponderance of the evidence that he was legally insane: that—regardless of whether he suffered from a mental disease or disability—he either could not appreciate the nature and quality of his actions at the time he committed the crime or could not appreciate the wrongfulness of those actions. Cal. Penal Code § 25(b); *Skinner*, 704 P.2d at 763-65. Here, only the latter question was at issue, for no one opined in any court that Mirzayance failed to appreciate that he was using a knife and a gun to kill.

Even if Mirzayance's parents and experts would have testified as alleged in his state habeas petitions, it would not be "objectively unreasonable" to conclude under *Strickland* that Mirzayance had failed to establish a "reasonable probability" that the jury would have found he could not appreciate the wrongfulness of his actions. Although the defense experts might have opined that Mirzayance did not know killing Melanie was wrong because he was acting on the paranoid delusion that he needed to defend himself, their testimony would have met the insurmountable obstacle of Mirzayance's obvious consciousness of guilt. Mirzayance parked his car some distance from the Ookhtens's house on the night of the murder. He waited until he was alone with Melanie in the house before he closed the curtains and commenced his attack with a silent weapon, the knife, resorting to the gun

only when Melanie began to scream and struggle. He immediately collected the knife and spent shell casings after the murder. He showered. He disposed of his bloody clothes in a trash can. And he concocted a false alibi on Melanie's telephone answering machine. Pet. App. 39-41, 123-25.

Further, he explicitly acknowledged the wrongfulness of his actions. He told his friend that same night that he "messed up big time" by killing Melanie. He explained to detectives that, right after disposing of his bloodstained clothes, "I went to the Pasadena Police and said I did *a murder*." Pet. App. 40-41, 169; CT 179 (italics added). When police asked how he felt about what he had done, he replied, "Very guilty; that's why I turned myself in." Asked if he felt "good" about his actions, he said, "No, very guilty, very bad . . . for what I've done." CT 181-82. Given these undisputed facts, it is not objectively unreasonable to conclude that Mirzayance so obviously understood the wrongfulness of his actions that his withdrawal of the NGI plea does not undermine confidence in the trial result.

Even if defense experts testified that Mirzayance somehow thought he needed to defend himself, their testimony would not compel the California Supreme Court to find *Strickland* prejudice. There was no direct evidence that Mirzayance held such a belief. He never submitted a declaration to that effect; there has never been a suggestion that he would have testified to that effect; and there is no evidence that he actually made such a claim to the defense experts. While the experts all described Mirzayance's claims to having previously experienced visual and auditory hallucinations, *none* opined he was hallucinating at the time he attacked Melanie. To the contrary, Mirzayance told police just hours after the murder that he killed Melanie because she had "pissed [him] off," *not* because he had to defend himself for any

reason, real or imagined.

Moreover, no defense expert disputed that Mirzayance knew that it was wrong to kill. Thus, the mere *speculation* by additional defense experts—that Mirzayance acted because of a paranoid delusion that he needed to defend himself—would have scant evidentiary weight, if any. The proffered expert opinions could not reasonably be reconciled with the jury's own determination that Mirzayance was guilty of premeditated and deliberate murder. The jury had previously rejected Dr. Satz's extensive guilt phase testimony that Mirzayance's mental impairments prevented him from the more demanding tasks of deliberating and planning a murder. Pet. App. 153-54.

The state-court record supports a reasonable conclusion that the jury would not have found Mirzayance could prove he met California's definition of insanity at the time of the killing. Given the lack of *Strickland* prejudice, the California Courts were not wrong—let alone "objectively unreasonable"—in rejecting Mirzayance's claim.

2. *The State-Court Rejection Of The Claim Was Reasonable In Light Of Mirzayance's Inadequate Showing Of Unreasonable Attorney "Performance."*

The state-court record also supports a finding that Wager's conduct comported with the "one general requirement" imposed by the Federal Constitution: "that counsel make objectively reasonable choices." *Flores-Ortega*, 528 U.S. at 477; see also *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987) (courts are to address *not* "what is prudent or appropriate, but only what is constitutionally compelled"). In assessing whether counsel in fact made a "reasonable choice," "hindsight is discounted by pegging adequacy to 'counsel's perspective at the time.'" *Rompilla*, 545 U.S. at 381 (quoting *Strickland*, 466 U.S. at 689, 691).

A reviewing court will "strongly presume [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Such review must be "highly deferential—and doubly deferential when it is conducted through the lens of federal habeas." *Gentry*, 540 U.S. at 5.

Traditionally, when assessing *Strickland* "performance," this Court has not focused on whether a challenged decision by an attorney made during trial was correct, or even prudent. See *Burger*, 483 U.S. 794. Rather, this Court's primary concern has consistently been whether counsel's decision was supported by a reasonable investigation, and was thus informed. See, *e.g.*, *Wiggins*, 539 U.S. at 523 (italics added). After that, tactical decisions made upon "thorough investigation" are "virtually unchallengeable." *Id.*

This Court has never set out any "clearly-established Federal law" disqualifying any particular litigation decisions, following full investigation, from being deemed "tactical." As in *Schriro* v. *Landrigan*, this Court has "never addressed a situation like this." 127 S. Ct. at 1942. Here, the California Courts were entitled to conclude that counsel's decision to forgo the NGI defense was rational, carefully considered, and well informed. Especially when viewed with "double deference" under AEDPA, it was a "reasonable choice" in light of the circumstances. See *Flores-Ortega*, 528 U.S. at 477; Pet. App. 68-71.

Wager—a highly experienced defense attorney who was well versed in the legal requirements of an NGI defense from his years as a "supervising expert on mental and insanity issues" at the Los Angeles District Attorney's Office—made the challenged decision only after extensive investigation exceeding what the Constitution requires. For example, Wager engaged in extensive expert

shopping, although he had no constitutional obligation to do so. See Ex. 9 at 1-2 (Decl. of Attorney Lund[5]); *id.* at 21-34 (Wager's "Work Schedule"); *Hendricks* v. *Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995). A reasonably competent lawyer might well have retained mental health experts and received negative opinions, such as those rendered in this case by Drs. Anderson, Sandhu, and Maloney. If a reasonable attorney had done so, he would have been entirely justified in not pursuing an NGI defense at all. This alone satisfies a proper competence inquiry under *Strickland*, and validates the "reasonableness" of the state-court adjudication. See *Calderon*, 70 F.3d at 1038.

In any event, Wager did far more than what was *minimally* required. He ultimately retained no fewer than eight expert doctors to evaluate Mirzayance's mental health. He retained jury consultants, conducted a mock trial in which he presented mental health defenses to two juries, hired a private investigator to interview friends and associates of Mirzayance and Melanie Oohktens, and consulted regularly with Mirzayance's parents and their personal attorney Lund. Ex. 6 at 12 (Decl. of Dr. Vicary); Ex. 9 at 2-3, 21-34 (Work Schedule). Wager also reevaluated the case following the jury's unfavorable verdict of willful, premeditated, and deliberate murder, and discussed the case with Dr. Blum the night before. Ex. 1 at 3-4 (Decl. of Dr. Blum); Ex. 15 at 2-3 (Decl. of Wager); Pet. App. 68-70. Even after the parents informed him that they would not testify, he consulted with co-counsel Boyle before making a final decision and advising Mirzayance. Ex. 15 at 2-3 (Decl. of Wager); Pet. App. 69-71.

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5. As noted, the significant documents and declarations admitted at the federal evidentiary hearing and discussed in this argument had all been submitted by Mirzayance to the state courts in habeas corpus proceedings. See Exs. 1-22.

Contrary to the Ninth Circuit panel's implication, Wager was not operating under any misconception that a first degree murder verdict precludes an insanity finding as a matter of law. See Pet. App. 6 at n.1. He simply recognized that the overwhelming evidence of Mirzayance's planning, malice, and attempts to cover his tracks, made it highly unlikely that the jury, which had already found Mirzayance premeditated and deliberated, would find he could not tell right from wrong or appreciate the wrongfulness of his act. See Ex. 15 at 2-3 (Decl. of Wager); Pet. App. 68-71, 153-54. Finally, for all the additional reasons discussed above in the context of prejudice, it was reasonable for Wager to conclude that an insanity defense would not have succeeded.

The record before the state courts fully supports a conclusion that Wager made a "reasonable choice." See *Strickland*, 466 U.S. at 690-91; *Flores-Ortega*, 528 U.S. at 481. Even if the California Supreme Court's decision was somehow *incorrect*, it cannot fairly be labeled as "objectively unreasonable" when viewed with the requisite "double deference." See *Gentry*, 540 U.S. at 5; *Musladin*, 127 S. Ct. at 654.

C. The District Court's Factual Findings Confirm That Wager Did Not Render Ineffective Assistance, And The Ninth Circuit Panel Erred By Supplanting Them With Its Own, Opposite Factual Findings

Even if the federal habeas court somehow were empowered to ignore deferential review under § 2254(d) and to hold an evidentiary hearing to resolve the claim instead, Mirzayance still would not be entitled to habeas relief.[6] Here, at the Ninth Circuit's direction, the district

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6. Mirzayance presented an ineffective-counsel claim to the state court and received a summary-judgment-type adjudication rejecting

court indeed held an evidentiary hearing. The district court's factual findings and credibility determinations, made after a four-day hearing, fully confirmed the "reasonableness" of the state-court adjudication. The

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the claim on its merits. In federal court, no evidentiary hearing could be necessary, or efficacious, in resolving the pure legal question of whether that state-court ruling met the deferential § 2254(d) standard. See, *e.g.*, *Williams*, 529 U.S. at 444. The § 2254(d) question is primary and dispositive—relief "shall not be granted" except in the rare case where the adjudication was so clearly wrong at the time that it fails to satisfy even the deferential review standard. A finding of unreasonableness must depend solely on the record evidence that had been properly presented to the state court when it adjudicated the federal claim, and not on any evidence newly presented in federal court. *Holland* v. *Jackson*, 542 U.S. 649, 652 (2004) (per curiam).

To the extent that the Ninth Circuit relied on evidence presented only in federal court as a basis for relief without regard to the state-record reasonableness of the state-court adjudication—here, for example, the panel attached importance to newly-presented evidence in the form of defense counsel's testimony about "hopelessness," see p. 49, *post*—the federal court violated § 2254(d) because such evidence was not before the state court when it adjudicated petitioner's claim. If that evidence were essential to the factual basis of the claim, or transformed or enhanced it, it could be considered by the federal court only if Mirzayance presented that newly-improved claim to the state court. See § 2244; *Vasquez* v. *Hillery*, 474 U.S. 254, 260 (1986); see also *Gray*, 518 U.S. at 163; cf. *Williams*, 529 U.S. at 443-44. Any resultant adjudication of that claim would later command § 2254(d) deference in federal proceedings: that is, the habeas petitioner may not circumvent the state court and § 2254(d) deference. The federal court properly could have considered the new evidence only if Mirzayance had been unable to secure a merits ruling from the state court, see *Williams*, 529 U.S. at 443-44, and could overcome any state-law procedural default in failing to secure such a ruling, see *Coleman* v. *Thompson*, 501 U.S. 722, 735 n. 1 (1990); *Teague* v. *Lane*, 489 U.S. 255, 270 (1989); *Murray* v. *Carrier*, 477 U.S. 478, 488-89 (1986)—or if he otherwise also met the strict statutory curbs on federal evidentiary hearings, § 2254(e)(2). Mirzayance made no such showings here. (The Warden notes that related issues are pending before this Court in *Bell* v. *Kelly*, No. 07-1223.)

Ninth Circuit erred in ignoring the findings and substituting its own contrary findings as the basis for relief.

1. The additional evidence adduced at the evidentiary hearing verified the absence of *Strickland* prejudice. As the district court found, the prosecution would have presented the testimony of the two court-appointed experts, Drs. Sandhu and Anderson, both of whom found Mirzayance sane. Pet. App. 65-68. Both of those independent experts did what Mirzayance's hand-picked ones did not do—they offered opinions that were consistent with the facts of the crime and refused to take Mirzayance's self-serving post-crime representations at face value. Most significant, as the district court noted, only Dr. Anderson directly asked Mirzayance what he was actually thinking at the time of the crime. By "direct query," he discovered what Mirzayance's experts studiously avoided: evidence that by itself would have doomed an insanity defense to failure. Dr. Anderson elicited from Mirzayance his admission that he felt his murderous actions of shooting and stabbing Melanie "*were wrong at the time of [the] present offense.*" Evidentiary Hearing Transcript (EHT) Vol. IV 10-11 (italics added); Ex. 25 at 4. The district court's fact-finding also made it clear that Wager's NGI decision was competent. Upon a lengthy and painstaking review of the evidence presented to the state and federal courts, the district court made "key" findings that Wager's decision was carefully considered, informed, and not rashly made. The district court found (1) that Wager had hired multiple mental health experts to testify at the sanity phase that Mirzayance had committed the killing without premeditation or deliberation; (2) that Wager had recognized that this expert testimony had "significant weaknesses," and that at the evidentiary hearing he

"convincingly detailed ways in which [the experts] could have been impeached[] for overlooking or minimizing facts which showcased [Mirzayance's] clearly goal-directed behavior"; (3) that the experts were subject to other impeachment, including evidence that one of them had altered his notes in a highly-publicized criminal case; (4) that Wager's strategy at the sanity phase had been to appeal to the jurors' emotions, which required "the heartfelt participation of [Mirzayance's] parents as witnesses"; (5) that Mirzayance's parents refused to testify, which made Wager's sanity-phase strategy "impossible to attempt"; and (6) that, prior to making his recommendation, Wager conferred with his "experienced co-counsel, Lawrence Boyle," who concurred in Wager's proposal. Pet. App. 68-71. Thus, the district court correctly concluded that under *either* deferential or de novo review, counsel was not shown to have rendered ineffective assistance under *Strickland*, and that—absent the Ninth Circuit's "nothing to lose" mandate—Mirzayance would not be entitled to habeas relief.

2. The Ninth Circuit panel, however, erroneously granted habeas relief based on its *own* findings of fact, and without regard to whether the district court's opposite findings were clearly erroneous. This approach violated AEDPA, in that it ignored the strict § 2254(d) limits on habeas relief for claims adjudicated on their merits in state court. See *Gentry*, 540 U.S. at 5 (federal habeas courts must review the *state-court* adjudications of ineffective-counsel claims, and do so with "double-deference.").

The Ninth Circuit's adjudication also contravened fundamental principles of appellate review of trial-court factual determinations, as set forth by the Federal Rules of Civil Procedure and this Court. Fed. R. Civ. P. 52(a); *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-74 (1985). A federal appellate court must assess a district court's factual

findings under the "clearly erroneous" standard of review. Fed. R. Civ. P. 52(a); *Anderson*, 470 U.S. at 573. As long as the trier of fact's account of the evidence "is *plausible* in light of the record viewed in its entirety," a circuit court of appeals may not reverse it "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74 (italics added). Moreover, "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). The Ninth Circuit violated these rules in this case.

As set forth above, and as recognized by the dissenting judge, "the district court found that the trial counsel had made a rational, carefully considered and informed decision to forgo the insanity defense." Pet. App. 32; see also Pet. App. 69 (district court finding that "The evidence supports [the Warden's] assertion that Wager carefully weighed his options before making his decision final; he did not make it rashly."). The district court also found that the parents' profound reluctance to testify at a sanity trial amounted to "an *express refusal* to testify." Pet. App. 32, 71 (italics added). But, without discussing whether the district court's findings were clearly erroneous, the panel majority concluded: "We disagree that counsel's decision was carefully weighed and not made rashly." Pet. App. 7. And, as for the parents' refusal to testify, the majority inexplicably stated that "the district court's finding that the parents *did not refuse*, but merely expressed reluctance to testify is correct." *Id.* (italics added). Nor did the panel majority discuss whether, in light of their expression of reluctance, a reasonable lawyer would have concluded that he could not use the parents to support an NGI defense.

The panel majority made too much of Wager's statement at the evidentiary hearing that he did not recommend withdrawing the NGI plea out of anger, as was alleged, but rather "I think more out of a sense of hopelessness." Pet. App. 5-6; see EHT Vol. I at 147. The comment simply confirmed that Wager had not acted "rashly," and reflected the opinion he and co-counsel shared: that an NGI defense would have failed under the facts and circumstances known to the defense team at the time. That assessment was, as the district court found, "rational" and "reasonable." Wager logically explained how an NGI case after the first degree murder verdict was, in fact, hopeless—not as a legally-prohibited verdict as a matter of California law, but as a practical matter under the evidence of this case. EHT Vol. I at 53-55, 60, 65, 125, 137, 139-40.

It would be perfectly understandable if Wager was startled or outraged at the unexpected turn of events concerning the parents' refusal to testify, which he felt was a "betrayal" of his client. See EHT Vol. I at 141-42. Despite that, Wager's assessment of the NGI defense as both hopeless and legally baseless in this particular case in fact was based on reasonable professional judgment. EHT Vol. I at 60, 137, 145-47. Such an assessment may not be condemned as *Strickland* incompetence. See, *e.g.*, *Evans* v. *Meyer*, 742 F.2d 371, 374 (7th Cir. 1973) (lawyer need not advise client of "every defense or argument or tactic that while theoretically possible is hopeless as a practical matter").

The dissenting judge rightly faulted the majority for granting relief based on its independent findings, made "without regard to the lower court's factual and credibility findings made after a four-day evidentiary hearing." Pet. App. 13-14. The district court's factual findings—which fully support the correctness and the reasonableness of the state-court decision—are well supported by the record, and

the panel majority did not suggest otherwise. As discussed earlier, the district court articulated at least six separate categories of evidence in support of its first "key" finding—that counsel's decision was carefully considered, informed, and not rashly made. See Pet. App. 68-71. As for the district court's second "key" finding—that the parents refused to testify—the district court dedicated an entire section of evidentiary analysis to the issue. Over the course of five pages, the district court detailed the extensive live testimony and record evidence upon which the court made its credibility determinations. Pet. App. 71-76.

It was improper for the panel majority, confronted with a cold record and with no opportunity to observe and compare the demeanor and persuasiveness of the witnesses, to twice set aside the district court's well-supported factual findings and to conclude instead that Wager's decision was "made rashly" and was not carefully weighed. It was equally improper for the panel majority to disregard the finding that the parents' conduct amounted to "an express refusal to testify" and to conclude instead that Wager "did not know with any certainty that Mirzayance's parents would not testify . . . ." Pet. App. 7.

In making its own contrary findings, the Ninth Circuit panel ignored the settled rule that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Anderson*, 470 U.S. at 573-74; *Zenith*, 395 U.S. at 123. Similarly, as noted above, the Ninth Circuit's factfinding violated AEDPA. As this Court recently stressed in *Rice* v. *Collins*, "[a] panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Rice*, 546 U.S. at 342.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: August 29, 2008

Respectfully submitted,

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RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
OCT 2 - 2008
OFFICE OF THE CLERK

No. 07-1315

In the Supreme Court of the United States

Michael Knowles, Warden, California Department of Corrections and Rehabilitation,

Petitioner,

v.

Alexandre Mirzayance,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent's Brief on the Merits

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STATEMENT OF THE CASE

Respondent Alex Mirzayance filed a habeas petition in the Central District of California challenging his state conviction for the murder of his cousin, Melanie Ookhtens. He asserted his trial counsel provided ineffective assistance of counsel in persuading him to waive his defense, not guilty by reason of insanity (NGI), on the morning the NGI trial was to commence. That defense, which federal courts found credible and which was amply supported by lay and expert testimony, was abandoned for no benefit to Mirzayance whatsoever. On the morning of trial, counsel deemed the defense "hopeless" and gave it up.

Mirzayance vigorously pressed the abandonment of the insanity defense claim in the California courts, but both the Court of Appeal and the California Supreme Court summarily denied relief without discussion of the issue. In three separate rulings, Ninth Circuit panels agreed the insanity defense was a strong one. The first panel, after finding the alleged facts in state and federal pleadings court were such that if proven would entitle Mirzayance to relief, remanded for an evidentiary hearing on why trial counsel abandoned the defense the morning the insanity trial was to commence. Pet. App. 105.[1]

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[1] Mirzayance will use the same abbreviations to the record as in the Warden's Brief on the Merits. "RT" cites are to the State trial transcript, "CT" to the State clerk's record, "Ex" are exhibits at the federal evidentiary hearing, and "EH" will be to the transcripts of that hearing.

At the evidentiary hearing, defense counsel confirmed he had no tactical reason for abandoning the NGI defense, and that nothing beneficial could have accrued as a result of abandoning it. Mirzayance proved the *bona fides* of the NGI defense through the testimony of three experienced forensic psychiatrists and two psychologists. They testified Mirzayance, due to a long standing serious mental illness,[2] met the California legal definition of insanity. They affirmed they were prepared to so testify at the NGI trial.

The Magistrate Judge's Report and Recommendation [R&R], adopted by the district court (Pet. App. 36.), found these and other "witnesses could have testified credibly and therefore perhaps successfully," Pet. App. 100, and granted the writ. Pet. App. 35-37. The Ninth Circuit affirmed, Pet. App. 24, and this Court remanded for further consideration in light of Carey v. Musladin, 549 U.S. 70 (2006). The Ninth Circuit reviewed Musladin and noted that at the time of Musladin's court's decision there was no decision of this Court that applied due process requirements to "private-actor courtroom conduct," as contrasted to "state-sponsored courtroom practices," therefore, no clearly established federal law to warrant federal relief from the state decision. Pet. App. 9. The Ninth Circuit then noted that, in contrast to the

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[2] There was no dispute about Mirzayance's serious mental illness. The prosecutor told the court at sentencing, "I feel he may have a psychosis...." RT 903. "He does appear to have some kind of mental illness." RT 905. *See also* defense counsel's comment: "And it's clear that he was psychotic at the time of commiting [sic] the offense." RT 908. The court added, "I do think that Alexandre Mirzayance is mentally ill." RT 915.

indeterminate state of the law as to spectator misconduct at the time of the state court decision in Musladin, the law of ineffective assistance was clearly established under Strickland and its progeny at the time of the state court decision in this case. The Ninth Circuit then affirmed the grant of relief based on a straightforward application of Strickland to the facts of this case. Pet. App. 8, 12.

STATEMENT OF FACTS

A. The State Trial on the Murder Charge.

In 1995, Mirzayance was a part-time college student living in Los Angeles. Mirzayance's parents lived in France and his paternal aunt lived in Los Angles. She was the mother of the decedent, Melanie Ookhtens, who was a college student at the University of Southern California. On October 13, 1995, her parents were out of the country on vacation. She and Mirzayance had planned to pick them up at the airport that night. Mirzayance went to the Ookhtens residence during the afternoon to meet Melanie. While Mirzayance was waiting there, Melanie's grandmother and aunt arrived at the residence to prepare the house for the parents' return.

When the grandmother and her daughter opened the front door, Mirzayance seemed "startled," "[m]aybe he was expecting Melanie, and when he saw us, he got confused." RT 96. The grandmother described Mirzayance as acting quite out of character. He was "following me wherever I was going with the strange walking." RT 97. She found that Mirzayance was acting very "manly" which was "extremely" abnormal for him (id., at 92), as Mirzayance normally was a "quiet, shy person."

Id. at 95. The grandmother testified Mirzayance's relationship with his cousin Melanie was extremely close, like "sister and brother." RT 94.

After the relatives left, Melanie arrived home. According to Mirzayance's statement to the police, Melanie was in an angry mood and complained that Mirzayance was watching television. She went to her room to change clothes. Mirzayance followed her to her room carrying a gun and knife. He entered her room and shot and stabbed Melanie to death. CT 161 -184. He then picked up some of the shells and clothing, went to his apartment, showered, and left a false message on the Ookhtens' answering machine stating that he could not come to the house.

He called his friend, Laurent Meira, confessed to him, dropped his bloody clothes in a garbage can, and then went to the police where he confessed he had killed his cousin. RT 117, 120-121, 149-156. He told Meira last for the past three days people were "after him" (RT 150), and he felt "pretty bad" and began carrying a gun. Ibid. Meira testified Mirzayance was a shy person who never spoke of his cousin Melanie other than in a fond and approving way, only expressing affection for her. RT 159,161.

Mirzayance's trial attorney, Donald Wager, called one mental health expert, Dr. Paul Satz, at the guilt trial[3] as the defense to first-degree murder.

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[3] The jury was informed during voir dire there would be two phases of trial and insanity would be considered only at the second trial. *E.g.*, RT June 13, 1997 (augmented), 258: "And if there is a finding of guilt then there would be a phase where the jury would need to determine whether he was legally sane or insane...." *See also* id. at 244, 315; RT June 16, 1997, 487; RT June 17, 1997, 553; RT June 18, 1997, 691.

Because of Mirzayance's fragile mental condition due to schizophrenia, Dr. Satz asked that Mirzayance be excused from the courtroom during his testimony.[4]

Dr. Satz testified he conducted thirty psychological and neuropsychological tests focusing on whether there was frontal lobe brain damage. Dr. Satz testified the tests revealed significant, longstanding brain damage. RT 467.

As part of his evaluation of Mirzayance's mental status, Dr. Satz reviewed extensive records from Mirzayance's upbringing that demonstrated serious mental deficiencies spanning the course of his life including "early experiences with auditory hallucinations." RT 469, 474-475.

Dr. Satz interviewed Mirzayance's friend, Laurent Meira, who stated "he had asked Alex why he smoked [marijuana] and Alex [Mirzayance] replied it makes the voices go away and I can sleep." Dr. Satz believed this was a form of "self-medication, particularly for very sick people, schizophrenics in particular." RT 495.

Mirzayance expressed to Meira shortly after the killing that he carried the gun because "he felt someone was after him." RT 497. This raised "the

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[4] "I would very much hope that he did not have to hear my testimony. It would be difficult for me and I feel that I would do more harm if he were to hear some of the dynamics and issues in this case. I think it would be very dangerous. And I would be potentially responsible." RT 439. This was granted and Mirzayance was not present during Dr. Satz's testimony. RT 440. This is relevant to refute the State's implication that Mirzayance's participation in the waiver of the NGI trial reflected an informed decision. *See* Pet. Brf. 21 (waiver "approved by Mirzayance").

question as to whether there was a delusional state, particularly of the paranoid type...." Ibid. Dr. Satz opined Mirzayance "most definitely had some form of schizophrenic disorder starting very early in life." RT 488.[5] Because of the additional component of depression, Mirzayance had a "schizoaffective" mental disorder. RT 492-493.

As to Mirzayance's post-homicide conduct, Dr. Satz stated "in this case you have a sick schizophrenic kid ... who is now trying to make some sense of a very explosive, irrational event." His "explanations are pathetic. And they are a product of a demented cognitively impaired sick person...." RT 501.

B. Jury Arguments.

At the close of the guilt evidence the prosecutor reminded the jury that their task was limited because the insanity aspect of the case was not before them: "you have been told there are two portions of this trial. This is the guilt portion. For this portion and this portion alone sanity is *conclusively presumed.* You are not dealing with that issue here." RT 768 (emphasis supplied). "No amount of evidence presented in this portion of the trial can overturn that conclusive presumption... So don't sit back there and argue whether or not he was insane or whether he was sane. That is not yet before you." RT 768-769; italics added.

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[5] "Schizophrenia is a severe disorder of affect cognition in social development marked by primary symptoms of delusions, hallucinations, most often auditory but could be visual too, marked by disorganization or reality testing...." RT 491-492.

Defense counsel Wager argued Mirzayance's conduct was without motive and was irrational, and was thus without deliberation. RT 816, 819. "Because he's sick he didn't weigh and consider the question of killing." RT 820, *see also* RT 823.

The prosecutor stated to the court outside the jury's presence that "the defense's whole argument rested on whether or not the defendant had a rational motive for this conduct." A rational motive, she argued, "is not necessary either to prove murder nor is it necessary for proof of premeditation and deliberation." RT 828-829. The court agreed, finding defense counsel had made "repeated statements about there being no rational thought on the deliberation which could lend the jury to misconstrue what is required." RT 830-831. The prosecutor expressly acknowledged that "the defendant did not act rationally," but that "does not negate premeditation and deliberation." RT 842-843. See also RT 844, "[a] finding of deliberation and premeditation is not negated by evidence a defendant's mental condition was abnormal or his perception of reality delusional."] RT 844.

The trial court repeated in its instructions that a finding of premeditation and deliberation is not dependent on the motivation for the act and that the necessary mental state is not "lacking when the considerations reflected on by the defendant were the product of mental disease or defect." RT 853.

C. Jury Deliberations.

Even with the truncated defense and the limits on what the jury could consider in reaching a verdict, the jury deliberated at length before finding first-degree murder. Deliberations began on June 24th, continued all day the 25th during which the

jury asked numerous questions about the evidence and law (CT 208-211), and concluded with a verdict on June 26th. RT 867.

D. Withdrawal of the NGI Plea.

After the first-degree guilt verdict, Mr. Wager remarked to the court the NGI phase was now "not an uphill battle at this point, this is a perpendicular climb. Like mountain climbing." RT 869.[6]

On the following morning when the NGI phase was to begin, Mr. Wager announced to the court:

> ... it is my firm belief that this jury based on their finding will not find the defendant insane on the basis of the evidence that I can present .... [¶] I've had a discussion with the defendant about his rights in this regard, and he is willing to, at my suggestion, and after careful consideration,[7] I think on

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[6] Wager's pessimistic assessment reflected his misunderstanding that the first-degree verdict was the functional equivalent of a jury finding Mirzayance could appreciate the wrongfulness of his conduct. As discussed *infra*, California removed insanity and diminished capacity concepts from the definitions of murder in 1982, with the result that a jury finding of premeditation and deliberation had no necessary relationship to the issue of sanity.

[7] At the evidentiary hearing, Wager testified he spoke with Mirzayance on the morning of the withdrawal in a courthouse holding cell by telephone through a glass panel. Wager wanted to tell him that withdrawing the insanity plea was "the only course of action that we could intelligently take at this time." EH1 66. He spoke with him "no more than 10 minutes...maybe 15." Ibid. It was the first time he had broached the idea of the waiver. Id., at 112.

his part, waive and give up his right to continue his plea of not guilty by reason of insanity and to withdraw that plea at this time. RT 874.

The court asked Mirzayance what medications he was taking. He replied, "Zoloft, Cogentin, Navane and Vistaril." RT 877. (These are anti-psychotic and anti-depressant medications. EH3 22.) The NGI plea was withdrawn, and Mirzayance was sentenced to a term of 29 years to life in prison. RT 914-915.

E. The Facts Presented at the Evidentiary Hearing.

The Warden fails to set forth many of the important facts established at the evidentiary hearing. Even though Mirzayance was the prevailing party, the Warden makes the inaccurate summary characterization: "[f]ollowing a four-day evidentiary hearing, the district court resolved the overall factual issues against Mirzayance." Pet. Brf. 8. In light of the failure to acknowledge the important factual record established at the evidentiary hearing, Mirzayance recounts it in relevant detail. One critical fact given extremely short shrift by the Warden, Pet. Brf. 49, is that Wager believed the NGI defense "hopeless." This belief was primarily premised on his serious misapprehension of California law and incorrect belief that the jury's first-degree verdict was the

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Mirzayance's reaction was "accepting." Id., at 66. Wager described Mirzayance as "severely mentally ill," "eager to please," "compliant," who did what Wager asked of him. EH1 96, 97.

functional equivalent of a finding that Mirzayance understood the wrongfulness of his act. EH1 125.

1. Wager's testimony regarding his inexperience with the NGI defense and mishandling of the guilt trial.

Attorney Wager testified at the evidentiary hearing that "Mirzayance was the first case I defended with an insanity defense." EH1 27.[8] He recognized at the outset that based on initial mental state examinations, "Alex Mirzayance was severely mentally ill, probably lower than average IQ, that there seemed to be no overt motive for the killing of Melanie Ookhtens." EH1 31.

An insanity verdict was "what we were really driving for more than anything else." EH1 50. Because that was the ultimate goal, he decided to "save most of the people for, other than [Dr.] Satz, for the sanity phase." Ibid. At the same time, he believed the likelihood of success on the NGI phase was contingent upon obtaining a second-degree murder verdict at the guilt trial because of his erroneous belief that a first-degree verdict meant "the jury, in effect, has found him to be sane." Ibid.

Notwithstanding his assertion about the importance of a second degree verdict to an NGI verdict, Wager limited his presentation in support of a second degree verdict at the guilt phase to Dr. Paul Satz, an academic psychologist whose cross-examination Wager viewed as an "absolute disaster," EH1 49, commenting that Dr. Satz

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[8] *Cf.*, Pet. Brf. 18, describing Wager as "well versed in mental health and sanity issues," a characterization not supported by Wager's testimony.

performed "terribly" on cross. EH1 89. But Wager made no effort to remedy this perceived disaster when he could have simply called one or more of the far more experienced forensic psychiatrists to testify at the guilt phase that Mirzayance's psychotic state at the time of the homicide was inconsistent with premeditation and deliberation. Ibid.

2. Retained expert opinions on insanity.

Three very experienced forensic psychiatrists provided detailed evaluations of Mirzayance. At the evidentiary hearing, they testified by stipulated declarations and/or by live testimony that Mirzayance was legally insane at the time of the homicide, and that they had been prepared to so testify at the NGI trial: Dr. Bennett Blum, EH2 11; Dr. Ronald Markman, EH2 49; Dr. Kaushal Sharma, Ex. 5-2. In addition, Dr. Satz found Mirzayance legally insane as well (Ex. 3-2), as did psychologist Dr. Richard Romanoff who stated that Mirzayance's "psychotic thought process caused a gross misperception of reality and a consequent potential lack of understanding of the knowledge of wrongfulness of the conduct at the time of the homicide." Ex 4-3.

Wager did not consult with any of these experts about whether to withdraw the defense. They were shocked to learn of it and were entirely prepared to go forward with their testimony. As Dr. Bennett Blum[9] testified:

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[9] Dr. Blum worked with the well-known forensic psychiatrist, Dr. Park Dietz. Dietz approved Blum's opinions in this case. EH2 47. Blum's report is written under the letterhead of Dr. Dietz & Associates. Ex. 1-14. The R&R specifically found Dr. Blum a "credible witness"

> Being informed of the decision to withdraw the insanity plea was a surprise to me given the conclusions reached by myself and other mental health experts regarding Mr. Mirzayance's state of mind. I was not consulted about this decision. In my judgment, based on the data and information available to me, the plea of not guilty by reason of insanity in this case was reasonable and thus my surprise at the announcement of its abrupt withdrawal. Ex. 1-5.

Dr. Ronald Markman[10] testified he "was not consulted prior to the abrupt withdrawal of the NGI plea which did not make either psychiatric or legal sense. In my judgment, based on the data and information available to me, the plea of not guilty by reason of insanity was a viable one to present to the jury." Ex. 2-5. Indeed, Dr. Markman "arrive[d] at the courthouse on June 27, 1997, prepared to testify" at the NGI trial. Ex. 2-3. Wager testified that when he told Dr. Markman he had just waived the NGI trial, Markman immediately responded, "Now, that was a mistake." EH1 123.

(Pet. App. 69), although it barely mentions that his testimony (at EH3 11) and written opinion which found that to a "reasonable degree of medical certainty" Mirzayance legally insane. EH3 27; Ex. 1-32. *See* Pet. App. 60-61.

[10] Wager selected Dr. Markman because he "had one of the better reputations among the panel psychiatrists as being a down the middle, honorable man. He has a law degree besides a psychiatry degree." EH1 34.

> Dr. Kaushal Sharma testified that he too was:
> ...very surprised to learn that the defense withdrew the insanity phase of the trial. I was not consulted about the wisdom of this course ahead of time and I would have questioned it. I would have asked why this was being done and what benefit there was in this course of action after a finding of first-degree murder. In my judgment, if presented to the jury, Alexandre [Mirzayance] had documentary evidence, lay witnesses, and qualified, experienced expert witnesses to support defenses to both premeditated murder and to show insanity at the time of the killing. I have seen mental state defenses put on with far less compelling supportive evidence. Ex. 5-4.[11]

Dr. Richard Romanoff was the first mental health expert to speak with Mirzayance after his arrest on October 13, 1995. He found it difficult to converse with him "due to the absence of any logical connection between the thoughts being expressed by Mr. Mirzayance." Ex. 4-1. Mirzayance complained of "ongoing auditory and visual hallucinations and intense fearfulness and paranoia." Ibid; *see also* his

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[11] Dr. Sharma was well regarded by the State. The prosecutor sought to have him appointed in the case as a court's expert. EH2 145.

raw interview notes. Ex. 23-1. Dr. Romanoff found a longstanding psychotic thought process. Ibid. Dr. Romanoff was prepared to give testimony at the NGI trial. The night before the trial was to begin, Wager told him by telephone he would testify the next day. They discussed his anticipated testimony. Ex. 4-2. However, the next morning, just as he was leaving for court, he was called by Wager's office and was told the "case had been resolved." Ex. 4-3.

There was additional lay testimony and documentary evidence supportive of the NGI defense. Dr. Sharma noted other NGI corroborative evidence including: Mirzayance's childhood history of abnormal behavior and mental health treatment,[12] the closeness of Mirzayance and Melanie's relationship (and thus a lack of a motive to kill her); and his repeated victimization in Los Angeles prior to the homicide; and his paranoid perspective at the time of the homicide. Ex. 5-5,16.

A jail psychiatrist prescribed and administered anti-psychotic and antidepressant drugs to Mirzayance while he was in pre-trial custody awaiting trial for 19 months, further confirming his major mental disorder. Ex. 2-2 (Dr. Markman).

Relatives gave testimony about Mirzayance's bizarre demeanor the afternoon of the homicide. Laurent Meira's testified about Mirzayance's belief in being followed and arming himself.

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[12] This included reports from France about Mirzayance's mental health. *See* Ex 6-35 (Dr. Magne); Ex 6-37 (Dr. Demule); Ex 6-38 (Dr. Boivin); Ex 6-39 (Dr. Lemmel); Ex 6-40 (Principal Barbaud); Ex 6-41 (teacher Pinaud); Ex 6-42 (teacher Regueme); Ex 6-43 (teacher Nuguez). These were also cited in the reports of Dr. Romanoff, Ex. 4, pp. 4-8; Dr. Blum at Ex 1, pp.16, 17, 19; and Dr. Markman: Ex 2, 13.

3. Court appointed experts.

Wager did not claim the opinions of the two court appointed experts influenced his decision to waive the NGI plea. Dr. Sarabjit Sandhu, a specialist in geriatric psychiatry (Ex. 26-6, 7), opined for the prosecution that Mirzayance did not come close to meeting the insanity standard. EH3 60. He believed Mirzayance's conduct was "goal directed", but also that he could "react impulsively, irrationally if you could use that term, reacted in a manner not quite congruent to the stimuli." Id. at 65. His post-crime conduct showed an ability to determine right from wrong. Ibid. *See also* Ex. 26-1.

Dr. Sandhu testified there was no legal or logical preclusion of insanity from a jury finding of first-degree murder. EH3 72. Although he stated he did not find paranoia (EH3 73), he agreed Mirzayance's bizarre behavior at the Ookhten home the afternoon of the homicide "could be somebody who has some paranoia, yes." EH3 89.[13]

Dr. Sandhu found "no motive or rationale for the crime," and knew the relationship between Mirzayance and his cousin had been fairly close. EH3 85. He agreed that while in jail following his self-surrender, that doctors at the jail "had to determine that he was psychotic in order to get an antipsychotic drug," as Mirzayance was prescribed. EH3 81-82. Mirzayance's childhood was "consistent

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[13] This was because in making his report he reviewed a police interview of the relatives at the Ookhtens' home on October 13, 1995, describing feeling "very weird an uneasy about [Mirzayance's] conduct." His face was so red it was "almost with hives." He followed one of the ladies around the house which made her nervous. EH3 86, 88, 89.

with someone who could become schizoaffective later in life." EH3 96. When asked, "when was the likely time he became psychotic," he replied, "It's hard to say at what point." He believed Mirzayance was disturbed and the psychosis came on after the killing. EH3 98. Prior to that point, he found it unlikely, but he "could not say." EH3 98, 99. If persons were reporting his having hallucinations prior to the killing, he would want to know more about it. EH3 75.[14]

Dr. Seawright Anderson's opinion, as initially elicited by counsel for the State, was that "at the time of the commission of the present offense that the defendant had the mental capacity to know the nature and purposes of his actions and also know that he was doing bodily harm to the victim at that time." EH3 9-10. He also testified that he asked Mirzayance "if he thought it was right or wrong to stab or shoot the victim," EH3 11, but was ambiguous as to whether the answer ("wrong") reflected Mirzayance's retrospective perception at the time of the subsequent interview or his actual perception at the time of the homicide.

Dr. Anderson believed Mirzayance "probably psychotic most of his life." EH3 47. He agreed with the diagnoses of Drs. Satz, Blum, and Romanoff. EH3 47-49. He agreed there appeared a

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[14] Had Wager done a competent fact investigation, he would have interviewed Melanie Ohktens' good friend, Lucy Davidian. The latter told a post-conviction investigator on March 12, 1998 that Mirzayance complained the week before the homicide of hallucinations. EH1 160. At the hearing, Davidian denied the statement (EH1 18) and repeatedly said she "did not remember" the interview with the investigator in her home, although it "may have" occurred. EH1 20.

psychiatric consensus of Mirzayance's psychotic illness and impairment. EH3 50-51. On inquiry about Mirzayance's ability to mentally reorganize after "he had a psychotic break at the time of the killing," Anderson said, "it means to me that he had the ability to recuperate or recover from a psychotic episode." EH3 52.

Dr. Anderson subsequently explained his understanding of the "knowledge of wrongfulness" prong of the California insanity standard "had to do with whether or not the person knew they were doing bodily harm to the person," and not "whether or not the person thought that they were justified in doing this act and therefore thinking it was right." EH3 32.

Counsel for the State attempted to clarify the ambiguity regarding the point in time at which Mirzayance recognized the wrongfulness of his conduct, and elicited Dr. Anderson's clear answer that Mirzayance did not believe his conduct wrong at the time of the homicide:

> Q. Is it also your opinion that at the time he was harming the victim he knew that harming her was wrong?
>
> A. I felt that he felt that he was justified in doing what he was doing because of the psychotic condition he was under. In breaking it down that way, we would say he felt that he was justified in not doing anything wrong from his interpretation, not from the legal interpretation. EH3 53-54.[15]

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[15] Not understanding legal or moral wrongfulness at the time of the homicide due to psychosis is legal insanity

4. Wager's testimony regarding withdrawal of the NGI plea.

Wager's decision to abandon the NGI trial was prompted by his erroneous understanding of California law. Pet. App. 6, fn 1. He believed the jury's finding of first-degree murder was the functional equivalent of a finding that Mirzayance was legally sane, and that the insanity defense was virtually hopeless for that reason. EH1 50, 99. Laboring under this erroneous belief, Wager believed the only possibility of a successful NGI verdict required jury nullification based on sympathy for Mirzayance if his parents testified and wrenched the jurors' hearts:

> "I saw no sense in proceeding with a defense that had no possibility now of having an emotional portion to it so that the jury could then find in favor of this defendant they had already found guilty of first-degree murder and, whether they knew it or not, under the facts of this case, legally sane. Without the parents, it would be hopeless. That was my feeling at the time." EH1 65.

For

> once the jury had found that he had maturely and meaningfully deliberated

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under the California insanity test. People v. Skinner, 39 Cal.3d 765, 780; 704 P.2d 752 (1985)(reaffirming "inability to appreciate moral wrong as a component of the California test of legal insanity"). The R&R omits this portion of Dr. Anderson's testimony from its summary. Pet. App. 65-66.

> and premeditated,[16] they had unknowingly decided that he had — he knew the consequences of his actions and the nature and quality of his actions although they didn't know it. But in order to find, therefore, that he was insane, he [*sic*] would have to in effect disregard their earlier findings. EH1 125. (emphasis added)

Wager repeated this erroneous belief of the impact of the first-degree verdict on a successful NGI result in his testimony. Insanity, he testified, "is not supported by their finding of first-degree murder in this case under the facts of this case since they found him to premeditate and deliberate the killing." EH1 60. Because of the finding, to win the NGI trial would require an emotional appeal and "not because he's legally entitled to [it]." Ibid. "I thought in front of this jury with their finding that we didn't have a chance to win the sanity phase...without the parents." EH1 137. At EH1 145, he repeated the passage block quoted above on the significance of the first-degree verdict adding: "Once the jury finds that someone has premeditated and deliberated their action, they have found under the facts of this case that he knew what he was doing and they appreciated the wrongfulness of what he was doing..."

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[16] As discussed *infra*, this definition of first-degree murder that Wager thought the jury had employed had in fact been deleted by legislation fifteen years prior to the trial. *See* Stephen J. Morse & Edward Cohen, "Diminishing Diminished Capacity in California," 2 CAL. LAW. 24 (1982) (as a result the "relevance of mental-health testimony is lessened greatly." Id., 25.)

Wager recognized that withdrawal of the insanity defense afforded no benefit to Mirzayance whatsoever, but rather doomed him to a mandatory life term in state prison:

> Q. Was there anything Alex [Mirzayance] gained by waiving the N.G.I. trial?
>
> A. [Wager] No. ER1 123.

Wager acknowledged that what he lost by giving up Mirzayance's NGI defense was the opportunity to "proceed to a mental health facility for treatment," and possible release upon recovery long before he would likely be paroled on the life sentence. EH1 123, 124.

Wager ventured he might have spoken to Dr. Blum the day of the guilt verdict and wondered "if we can have any chance at all and whether it should just be waived." Pet. App. 52. (Dr. Blum testified Wager told him the night before the NGI trial was to begin that he was going to withdraw the NGI plea. Ibid.)

At the hearing, Wager detailed the "consciousness of guilt" facts in Mirzayance's behavior following the killing that made the NGI case more difficult. These included the message left on the phone, cleaning up, and his confessions. EH1 51-52. All of the experts were aware of these facts when they arrived at their opinions that Mirzayance was legally insane at the time of the killing. EH1 99. (At trial, he argued to the jury: "Thousands of people commit crimes and try to avoid detection when they have never coldly calculated, weighed and considered before the crime whether to do it or not." RT 826.)

Wager testified that on the morning the NGI was to commence, the parents refused to testify. EH1 57, 59. Mirzayance's parents denied they refused to testify. EH1 170, ER2 107. Their family attorney, James Lund, testified that on the morning of the NGI trial, Wager did not tell him the parents refused to testify. Rather, Wager told him that Wager believed the parents were in "too much pain" or "anguish" to testify. EH2 93. (The R&R found that "[w]hile it therefore may be accurate in a precise, semantic sense to say that the parents never *refused* to testify, the Court finds that the parents at least expressed clear *reluctance* to testify, which, in context, conveyed the same sense as refusal." Pet App. 72 (emphasis in original).)

Wager made no efforts to pursue the NGI defense that morning. After the parents declined to testify, he did not try to persuade them parents to testify.[17] He did not advise them to talk to Mirzayance's psychiatrists about their reluctance even though they had a working relationship with all of them. EH1 82. Wager said he believed the parental decision to not testify was pre-planned. EH1 140-141.

Wager never informed his client that his parents had purportedly refused to testify. He did not ask Mirzayance to talk to them about it. He did not tell him all the experts would testify he was NGI regardless whether his parents testified. EH1 111.

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[17] As the Circuit majority stated, "[c]ompetent counsel would have attempted to persuade them to testify, which counsel here admits he did not." Pet. App. 7. This was certainly an alternative given the equivocation of Mirzayance's father who told Wager that morning that he would not testify, that he would testify, and then that he would not. EH1 106.

113. He did not discuss with the mental health experts strategies for addressing the parental reluctance to testify.[18] He did not proceed with the expert witnesses subpoenaed for trial that day, which would have thus given the parents that Friday and the weekend to reconsider.

Wager knew he could proceed with expert testimony at the NGI trial in that the first-degree murder verdict would not impact their testimony. EH1 99. The experts testified at the hearing that they could have presented their testimony with equal vigor whether or not the parents testified because the parents' information had been incorporated into their opinions from prior interviews. *E.g,* Dr. Blum, Ex. 1-5; Dr. Markman, Ex., 2-6; Dr. Sharma, Ex 5-4, 5. Wager acknowledged that the parents had been interviewed by each of the experts. EH1 81-82.

Yet, Wager made the withdrawal decision when so angry that he could not even assure the federal court he was functioning as appellant's advocate: "Q. Do you think that morning, given your anger at the parents, you became so emotional that you lost your sense of advocacy? ¶ A. I'm not sure. I'm not sure." EH1 124.

Summary of Argument

Mirzayance's argument is that the Circuit majority performed an entirely unremarkable application of Strickland v. Washington, 466 U.S.

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[18] Despite Drs. Romanoff, Blum, Markman, and Sharma all having "significant experience in the testifying to forensic matters" (EH1 90), Wager did not consult with them about the decision to waive.

668 (1984) to the facts as presented to the state court and as expanded at the federal evidentiary hearing. Its conclusion that Mirzayance was entitled to relief under 28 U.S.C. § 2254(d) was entirely consistent with the conclusion reached by the district court.

However, the Warden mischaracterizes what the Ninth Circuit did and misstates what the record shows in order to make this case appear to the Court as something that it is not. A careful, fair examination of the record and of the opinion below will disclose the numerous ways in which the certiorari petition and the Warden's Brief distort the issues presented, and will demonstrate that the judgment below is well-founded in fact and in law.

The Warden's challenge to the Circuit majority opinion has three primary components: (1) to impugn the Circuit majority's straightforward application of Strickland by inaccurately branding it as a "novel 'nothing to lose' rule," Pet. Brf. 15; (2) to impugn the Circuit majority's factual basis for its deficient performance conclusion by holding out an irrelevant divergence between the district court and the Circuit majority's characterization of trial counsel's internal subjective state when he abandoned the NGI defense, Pet. Brf. 19; and (3) to impugn the Circuit majority's Strickland prejudice conclusion by inaccurately asserting that one of the state-appointed psychiatrists had elicited a virtual confession of sanity from Mirzayance, Pet. Brf. 46. Each of these points of attack is contradicted by the record, and none provides any basis for reversing the Court of Appeals.

Regarding the attribution of a "nothing to lose" rule to the Circuit majority, the Warden relies solely on his own powers of characterization, and

not on the substance of the Circuit majority's analysis.

The Warden acknowledges, as he must, that the Circuit majority expressly repudiated the suggestion that it was relying on a "nothing to lose" rule, but nonetheless argues that the Circuit majority "dress[ed] the 'nothing to lose' rule in sheep's clothing" and "simply inverted the phrase" from "nothing to lose" to "nothing to gain." Pet Brf. 23. This is an effort to elevate semantics over substance because the content of the Circuit majority's analysis is textbook Strickland regardless of the label attributed by the Warden. This Court may well have had concerns at the time of its February 20, 2007 remand order whether the Ninth Circuit applied the clearly established law of Strickland in light of the district court's misapprehension that the Ninth Circuit had promulgated a "nothing to lose" rule – "[i]f petitioner had nothing to lose under Profitt – whether Profitt merely applies Strickland or extends it – the command of the Ninth Circuit is that therefore petitioner is entitled to relief." Pet. App. 99 (emphasis in original). The Ninth Circuit responded with an express disavowal of any reliance on Profitt for any purpose other than its discussion of the nature of a tactical decision under Strickland. Pet. App. 5, section III.

The Warden, however, ignores the Ninth Circuit's express disavowal of a "nothing to lose" rule, and argues to this Court as if it had adopted the district court's grounds for relief, even though the Circuit majority expressly rejected them – "We affirm the district grant of habeas relief, albeit on different grounds." Pet. App. 12. The Circuit majority clearly complied with this Court's remand

directive to reconsider its ruling in light of Musladin, and reaffirmed that its grant of relief was on "different grounds" than relied on by the district court. Pet. App. 12. The Circuit majority's ground was a straightforward, fact-based application of Strickland.

Regarding the purported factual conflict as to the rashness *vel non* of trial counsel's decision, Pet. Brf. 49, the Warden juxtaposes the statement in the Report and Recommendation below – "Wager's decision was carefully considered, not rashly made", Pet. App. 69 – with the Circuit majority's statement – "We disagree that counsel's decision was carefully considered and not rashly made" Pet. App. 7. The Warden highlights this juxtaposition as indicative that the Circuit majority failed to accord deference to the district court's fact finding, but the Warden fails to recognize that the conflicting characterizations about trial counsel's subjective internal state when he abandoned the NGI defense are essentially irrelevant to the Strickland issue whether the decision was objectively reasonable. An attorney can ponder a decision for two minutes, two days, or two months, while in varying states of internal calm or tumult, all of which is irrelevant to the objective reasonableness. The decision of the Warden has elected to stand or fall on the irrelevant ground of diverging characterizations of defense counsel's subjective "rashness," while the Circuit majority reached its conclusion on the basis of counsel's lack of objective reasonableness.

Regarding the Warden's prejudice argument, the Warden deems it "most significant" that one of the state-appointed psychiatrists, Dr. Anderson, single-handedly "discovered what Mirzayance's experts studiously avoided – evidence that by itself

would have doomed an insanity defense to failure." Pet Brf. 46. However, the Warden's dramatic characterization is incompatible with the evidentiary hearing record. The Warden refers to Dr. Anderson's testimony regarding his interview with Mirzayance, and cites to EH3, 10, 11, at which Dr. Anderson reported that Mirzayance acknowledged it was wrong to have killed his cousin. However, the Warden fails to inform the Court that the cited passage was ambiguous as to whether Mirzayance was acknowledging the wrongfulness of his conduct from his retrospective perspective at the time of the interview, or from his real-time perspective at the time of the homicide. The Warden further fails to inform the Court that this ambiguity was dispositively resolved as Mirzayance' retrospective acknowledgment of the wrongfulness of his conduct, reached after the passage of several months and with the benefit of an anti-psychotic medication regimen. Dr. Anderson clearly explained under questioning by the State's attorney that Mirzayance believed at the time of the homicide that he was "justified" and was "not doing anything wrong from his interpretation" due to his "psychotic condition." EH3 53-54. Thus, the Warden's "most significant" evidence in derogation of the Circuit majority's prejudice finding turns out to be a serious misreading of the evidentiary hearing record. In fact, the testimony of Dr. Anderson, taken as a whole, fully supports the NGI defense that the district court and Circuit majority found credible.

In sum, the Warden's attacks on the Circuit majority's conclusion are contrived, contradicted by the record , and provide no basis for reversing the Court of Appeals' judgment.

Argument

The Circuit's Holding Correctly Applied 28 U.S.C. § 2254 to an Ineffective Assistance of Counsel Claim for Which Mirzayance Established Both Deficient Performance and Prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

The standard for review of IAC claims was well established by 1999, when California summarily denied review of Mirzayance's claim:

> We established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687, 80 L.Ed.2d 674, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688, 80 L.Ed.2d 674, 104 S.Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Ibid.

Wiggins v. Smith, 539 U.S. 510, 521 (2003); *accord* Rompilla v. Beard, 545 U.S. 374 (2005); Williams v. Taylor, 529 U.S. 362 (2000).[19]

A. The Circuit Majority Decision Did Not Adopt a New "Nothing to Lose" Rule.

The Warden's primary argument is that the Circuit majority, while plainly repudiating any reliance on a "nothing to lose" rule, Pet. App. 5, 11, nonetheless implicitly used it to reach its result. This, of course, would be a rule unrecognized by this Court. Thus, the argument runs that the Circuit erred in its application of 28 U.S.C. § 2254(d). Pet. Brf. 15.[20] This is a fiction promulgated by the

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[19] Taylor, Rompilla and Wiggins are post-AEDPA cases. Even though they were not decided by this Court prior to finality of the state decision here in 1999, as post-AEDPA cases, they were decided by the law at the time of the finality of state review in those cases. In Rompilla, state review ended in 1995, Wiggins became final in 1991, and Taylor's state habeas review was final in 1997. Thus, those cases applied the controlling law prior to when Mirzayance's case became final.

[20] The Warden's claim is that the Circuit "majority erroneously applied a novel 'nothing to lose' test for ineffective counsel, one never adopted by the Court in its Strickland cases...." Pet. Brf, 15. But the Circuit majority answered the erroneous assumption of the district court and magistrate stating they "misapprehended our prior remand for an evidentiary hearing...," Pet. App. 5, 13. This was a direct response to the district court's view that "[t]he remand opinion mandate that the applicable substantive law by which this Court must judge the remanded claim is the 'nothing to lose' rule pronounced in *Proffit*." Pet. App. 99.

Warden presumably to induce the Court to view the Circuit majority decision as misguided as the Seventh Circuit's decision in Wright v. Van Patten, 128 S.Ct. 743 (2008), and the Ninth Circuit in Carey v. Musladin, supra.

What the majority decision held was that defense counsel's performance was unreasonable under Strickland. Significantly, the dissent also addressed the issue entirely within settled Strickland rulings. The Warden stands alone in contending that the Circuit majority created and applied a "novel" extension of Strickland. The Circuit majority simply held defense counsel's rationale for abandoning the defense "fell below an objective standard of reasonableness." Pet. App. 5. Clearly, nothing in that Strickland application implicitly or explicitly promulgates a novel rule.

Further, the Court was unanimous in stating that the Magistrate and district court misapprehended the original panel's[21] remand instructions and the significance of its citation to Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987). The majority explained the Profitt citation in the remand order "indicated only that labeling a decision 'tactical' does not necessarily mean that a true tactical choice, one 'between competing alternatives that each have the potential for both benefit and loss' was made." Pet App. 5.[22]

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[21] The original panel was composed of Judges Beezer, Fernandez and Paez. Pet. App. 102-116. The second and third Circuit decisions were made by Circuit Judges Wardlaw and Hug, with District Court Judge Suko dissenting.

[22] *See e.g.*, Moore v. Johnson, 194 F.3d 586, 615 (5th Cir. 1999) (a strategic decision is one made "on the basis of sound legal reasoning, to yield some benefit or avoid some

The flaw in the Warden's position is its mischaracterization that the Circuit majority decision promulgated a new rule that counsel has a duty to present *any* remotely colorable defense, no matter how implausible, if there is nothing to lose. Notwithstanding the Warden's effort to paint the Circuit decision into a contrived corner, the decision fairly read states only that counsel has a duty to present a substantial viable defense where there was an objective prospect for success and no strategic or other benefit in abandoning it.[23]

The district court did grant relief based on its misapprehension that it was obligated to apply a "nothing to lose" rule derived from Profitt, supra, Pet. App. 99, whether or not it was an extension of Strickland, and that may well have caused this

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harm to the defense"); Clozza v. Murray, 913 F.2d 1092, 1099 (4th Cir. 1990) (there is a "distinction which can and must be drawn between a statement or remark which amounts to a tactical retreat and one which has been called a complete surrender.... [A] 'complete concession of the defendant's guilt' may constitute inef2fective assistance of counsel"); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (ineffectiveness found where counsel "did not choose, strategically or otherwise, to pursue one line of defense over another," but instead, "simply abdicated his responsibility to advocate his client's cause").

[23] The Warden cites Evans v. Meyer, 742 F.2d 371, 373-374 (7th Cir. 1984), to assert defense counsel need not argue every theoretical defense. Pet. Brf. 49. Evans, however, held a defendant had an "at best" theoretical defense of intoxication, but faced 120 years if convicted by trial. Counsel's advice to plead guilty and receive a 9 and 1/2 year sentence was deemed reasonable because "no competent counsel would have advised Evans to risk a trial in which his defense would have been intoxication." Id. at 373.

Court concern as the proper application of §2254(d). At this point, however, the Circuit majority has made it abundantly clear that the state court disposition was an unreasonable application of settled Strickland doctrine, nothing more.

The Circuit majority did not hold every possible defense must be advanced, and comports with this Court's prior decisions that some potentially meritorious defenses may be sacrificed in favor of a better defense or in favor of a plea that reduce the defendant's exposure. Jones v. Barnes, 463 U.S. 745 (1983), *cited at* Pet. Brf., pp. 17, 25, 30, makes this point in the appellate context. There, a defendant requested several issues be included in his appellate counsel's presentation. Counsel exercised his own discretion and argued on behalf of his client three of the seven issues as the strongest arguments for relief. All of the issues were before the appeal court. Jones upheld counsel's *strategic choice* to argue the strongest issues without abandoning others: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752.

Jones v. Barnes stands for the non-controversial proposition that counsel's reasoned choice to argue *stronger* claims as opposed to *marginal* ones is effective assistance of counsel. It does not stand for the proposition that counsel may simply abandon all of a client's potentially meritorious defenses for no justifiable reason. See also Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997) (counsel "did not present any mitigating evidence because he did not think that it would do any good. However, [because witnesses]...were available and willing to testify on his behalf, this reasoning does

not reflect a strategic decision, but rather an abdication of advocacy.")

The Warden's reliance on Jones v. Page, 76 F.3d 831, 843-844 (7th Cir.1996) is similarly misplaced. Jones found counsel's failure to present an insanity defense to be reasonable because counsel had investigated it and found *no evidence* supporting it. He had consulted with a mental health professional who had been seeing Jones and who opined there was no basis for an insanity inquiry. Here, in contrast, counsel's investigation yielded an unusually large amount of credible NGI evidence, which counsel could not scuttle without any benefit to Mirzayance.[24]

B. The Circuit Majority Correctly Applied the 28 U.S.C. § 2254(d) Standard of Review.

The State argues that "[n]othing in the opinion addresses the dispositive Section 2254(d) question of whether the state-court decision was at least reasonable under clearly established law." Pet. Brf. 16. That is simply wrong. The Ninth Circuit majority specifically concluded upon full review that "the state court's denial of habeas relief to Mirzayance was 'contrary to, or involved an unreasonable application of, clearly established Federal law." Pet. App. 5. *Accord*, id., at 12. Thus,

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[24] The Warden's new rule considerations (abandonment of the only, non-futile defense with no downside to presenting it) are those that must be considered as part of any Strickland reasonable performance calculus. That Mirzayance had the prospect of substantial gain by going forward with his credible insanity defense, with no countervailing downside to presenting it, was very relevant to finding unreasonableness.

the answer to the first Question Presented in the petition for certiorari – "Did the Ninth Circuit again exceed its authority under section 2254(d) by granting habeas relief without considering whether the state-court adjudication of the claim was 'unreasonable' under 'clearly established Federal law'"– is "No."

Most of the argument in the Warden's brief does not even undertake to answer this Question Presented, i.e., whether the Circuit majority granted relief "without considering whether the state-court adjudication of the claim was unreasonable under clearly established law." Instead, it addresses a different question, *i.e.,* whether the Circuit majority's grant of relief, upon considering whether the state court adjudication was unreasonable under clearly established federal law, was a correct result. While this question involves nothing more than a claim that the Court of Appeals' result was incorrect — not generally a staple of this Court's discretionary docket — Mirzayance will address it as well.

1. The type of § 2254 review applicable to the state court adjudication in this case.

The specific type of § 2254(d) review to be applied by the federal courts must reflect the type of state court adjudication under scrutiny. In the prototypical case that Congress most likely had in mind when it enacted § 2254(d), the state court adjudication involved both a reasoned, written opinion and an adequate development of the factual record in support of the claims. This is the type of state court adjudication addressed in Carey v. Musladin, supra, Wright v. Van Patten, supra,

Schriro v. Landrigan, ___ U.S. ___, 127 S.Ct. 1933 (2007), and the other cases cited by the Warden.

This case is distinguishable in two crucial ways: the state court failed to provide any written opinion as to the NGI abandonment claim; and the state failed to provide any type of procedural opportunity for essential fact development. In the absence of a written state court opinion, the federal courts are obliged to undertake a different type of analysis, necessarily less deferential to the state court because there is no written opinion to defer to. Similarly, in the absence of an adequate opportunity for fact development in state court, the federal courts are obliged by [Michael] Williams v. Taylor, 529 U.S. 420 (2000) to conduct an evidentiary hearing, which in this case produced pertinent facts supporting the claim that were never before the state courts, and which provides a different reason why the usual § 2254(d) deferential approach must be modified and adapted.

This Court has given ample guidance to the federal bench regarding the proper manner of applying § 2254(d) where there is a written state court decision. *See, e.g.*, Carey v. Musladin, supra; Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (per curiam); Rice v. Collins, 546 U.S. 333, 342 (2006).[25]

Where, as here, there is a summary state court disposition but no specification of any clearly

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[25] The Warden incorrectly describes Collins as a case in which "the Ninth Circuit improperly ignored that [2254(d)] standard, and then substituted its de novo evaluation of a federal evidentiary hearing record for the state court's evaluation of the state court's record." Pet. Brf. 16. However, there was no federal evidentiary hearing in Collins, and there was a written state opinion, thus distinguishing it from this case.

established federal law and no discussion of the factual record, this Court has not yet provided specific guidance to federal courts for this situation. However, if § 2254(d) is to apply at all,[26] it follows that the federal court must in effect construct a proxy analysis in the face of the state court's silence, and then test the state court's disposition against that proxy analysis for reasonableness under § 2254(d). This analysis-by-proxy requires the federal court to make its best effort to identify any clearly established federal law on the assumption that the state court implicitly identified the same rule of decision; then review the factual record, and determine under § 2254(d) whether the state court's disposition fell within the range of reasonable outcomes.

Similarly, a modified application of § 2254(d) is required where, as here, (1) the federal court properly held an evidentiary hearing under §2254(e) as construed in [Michael] Williams v. Taylor, 529 U.S. 420, 434-435 (2000); and (2) the evidentiary hearing yielded facts supporting Mirzayance's claim for relief that were not part of the state court record. Again, this Court has not yet provided specific

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[26] The Circuits have taken different views on this question, *compare* McAdoo v. Elo, 365 F.3d 487, 498 (6th Cir. 2004) ("When a state court fails to address the merits of a properly raised ineffective assistance of counsel issue, this court conducts its review de novo"), *with* Schaetzle v. Cockrell, 343 F.3d 440, 443 (5th Cir. 2003) ("when...state habeas relief is denied without an opinion...our court: (1) assumes that the state court applied the proper 'clearly established Federal law'; and (2) then determines whether its decision was 'contrary to' or 'an objectively unreasonable application of that law").

guidance to federal courts for this situation,[27] but if § 2254(d) is to apply at all,[28] it must be based on the federal court's application of the clearly established federal law, which it must independently determine in the absence of a written state court decision, and apply it to the body of facts as determined in the federal evidentiary hearing.

[Michael] Williams v. Taylor, supra, and 28 U.S.C. § 2254(e)(2) recognize that this puts the federal court into a significantly different position regarding the state court result. When the state court has refused to permit a state habeas petitioner to develop the facts bearing on his federal claim, the federal court must hold a hearing to ascertain the relevant facts. Once that hearing has been held and the facts determined by the federal court, the federal court's decision will necessarily be based upon information that was not known to the state court. At this point it is neither possible nor sensible to try to reconstruct the state court's rationale and assess it for reasonableness, with the result that only two approaches to §2254(d) make any sense now. The federal court can ask whether the state court's result is unreasonable in the light of the facts that the federal court has found to be true. That is the maximum possible deference that

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[27] Holland v. Jackson, 542 U.S. 649, 652-653 (2004) noted that "[w]here new evidence is admitted, some Courts of Appeals have conducted de novo review on the theory that there is no relevant state-court determination to which one could defer."

[28] Several Circuits have viewed this circumstance as relieving the federal courts of giving any deference to the state court's disposition, *see, e.g.*, Monroe v. Angelone, 323 F.3d 286, 297-299, and n.19 (4th Cir. 2003); Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004).

it can give a state court which decided the case without relevant facts.

Alternatively, the federal court can ask whether the state court's result is wrong and, if so, the federal court can grant relief on the ground that a state court decision "involve[s] an unreasonable application of" federal law (within §2254((d)(1)) when the state court has so far deviated from the proper process for applying federal constitutional law as to make an incorrect ruling on a federal constitutional claim after having willfully foreclosed necessary factual development and blinded itself to relevant facts.

Mirzayance believes that the latter approach is preferable because it most closely comports with this Court's decision regarding the necessity of adequate state court fact-development proceedings as a prerequisite to the reasonable application of federal constitutional law. Panetti v. Quarterman, __ U.S. __, 127 S.Ct. 2842 (2007) concluded that "no deference is due" to the state court's denial of Panetti's claim of incompetence to be executed because "[t]he state court's failure to provide the procedures mandated by Ford constituted an unreasonable application of clearly established law as determined by this Court." 127 S.Ct. at 2855. Panetti stated that the "basic requirements" of procedural due process regarding a Ford claim include "an opportunity to submit 'evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination,'" id. at 2856, quoting Ford v. Wainwright, 477 U.S. 399, 427 (1986). Applying that settled principle to the ineffective assistance of counsel arena, the state must provide at a minimum a mechanism for the petitioner to obtain and present the evidence that, if

credited by the trier of fact, would entitle him to relief.

In this regard, McNeal v. Culver, 365 U.S. 109 (1961) granted certiorari to determine whether the state court's refusal to afford the petitioner a hearing on his claims constituted a violation of due process. McNeal concluded that the petitioner had stated a cognizable due process claim; that the record was inadequate to determine the truth of his allegations; but that "the allegations themselves made it incumbent on the Florida court to grant petitioner a hearing to determine what the true facts are." 365 U.S. at 117.

The California courts' refusal to afford Mirzayance the opportunity to develop relevant facts that he had requested violated both California habeas corpus procedure, People v. Duvall, 9 Cal.4th 464, 474; 886 P.2d 1252 (1995), and federal due process. Under these circumstances, the federal court's responsibility under §2254(d) should consist of determining whether the state court disposition was wrong, and if so, that it was also unreasonable in light of the truncated and inadequate fact development procedures.

2. The Circuit majority correctly applied the type of review appropriate to the state court adjudication.

As between the two possible approaches to § 2254(d) where there is no written state court opinion and no adequate opportunity for fact-development, the Circuit majority undertook the more § 2254(d)-deferential review, and set forth its mode of analysis as follows:

> We are required by the Antiterrorism and Effective Death Penalty Act, Pub. L.No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") to give significant deference to the decision of the state court. Where, as here, the state court has provided an adjudication on the merits of the habeas claim, but has not explained its underlying reasoning or held an evidentiary hearing, however, we conduct an independent review of the record to determine whether the state court's final resolution of the case was an unreasonable application of clearly established federal law. Pet. App. 4.

The Warden incorrectly characterizes the Circuit majority's methodology with his assertion that "[t]he Ninth Circuit saw Panetti as somehow justifying de novo review when the facts of a state case can be distinguished from this Court's precedent," Pet. Brf. 28-29, but that is patently incorrect. Nowhere does the Circuit majority claim to engage in de novo review of the issue; and nowhere does the Circuit majority actually engage in de novo review in any form. Rather, the Circuit majority engaged in the standard AEDPA procedure of identifying the clearly established federal law of Strickland v. Washington, 466 U.S. 668 (1984); applying Strickland to the facts determined at the federal evidentiary hearing; and then determining whether the State court adjudication was within the range of reasonable outcomes.

The Circuit majority concluded that trial counsel did not make a "true tactical decision" when counsel abandoned the insanity defense, Pet. App. 6,

i.e., within the meaning of this Court's Strickland jurisprudence. The Circuit majority found deficient performance because, inter alia, trial counsel incorrectly believed that the jury would view its verdict of first-degree murder as akin to a lay version of res judicata as to sanity, Pet. App. 6, and on the consequent "unreasonable assumption" that the jury would necessarily reject the sanity phase evidence that petitioner was legally insane. Pet. App. 7.

This Court has repeatedly reaffirmed that an attorney's decision based on a misunderstanding of the applicable law is not a true tactical or strategic decision for purposes of Strickland analysis. Kimmelman v. Morrison, 377 U.S. 365, 285 (1986) rejected an attorney's justifications for failing to file a potentially meritorious suppression motion and failing to file a discovery motion:

> Viewing counsel's failure to conduct any discovery from his perspective at the time he decided to forego that stage of pretrial preparation and applying a "heavy measure of deference," ibid., to his judgment, we find counsel's decision unreasonable, that is, contrary to prevailing professional norms. The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law – or a weak attempt to shift blame for inadequate preparation. (emphasis supplied)

Similarly, [Terry] Williams v. Taylor, 529 U.S. 362, 395 (2000) rejected trial counsel's reasons for failing to obtain documentary mitigating evidence for a penalty trial because of a misunderstanding of the law:

> They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. (emphasis supplied)

Here, trial attorney Wager's abandonment of the insanity defense was based on an equally fundamental misunderstanding of California law, a misunderstanding that he repeated at the federal evidentiary hearing. EH1 50, 99, 125. See Statement of Facts, Part E-4, supra, at 24, 25. The Circuit was correct in its finding of deficient performance because as stated in Wiggins, he did not "mak[e] an informed choice among possible defenses," Wiggins v. Smith, 539 U.S. 510, 525 (2003). That is the only rational conclusion available under Strickland and its progeny, rendering the state court's disposition of Mirzayance's claim unreasonable under § 2254(d).

The stark testimony from trial counsel at the evidentiary hearing unequivocally supports the circuit majority's determination:

> Q. Was there anything Alex [Mirzayance] gained by waiving the N.G.I. trial?
>
> A. [Trial counsel] No. ER1 123.

The Warden cites United States v. Cronic, 466 U.S. 648 (1984) for the proposition that "counsel does not perform deficiently by making an informed decision to forgo a bona fide defense." Pet. Brf., 25.

However, the context of the quote is that counsel may only forgo a bona fide defense where counsel has developed an alternative strategy that is preferable to the client. Cronic states "even when there is a *bona fide* defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." Id., at 657. In some circumstances a guilty plea may provide more benefit to the client than going to trial even with a colorable defense.

Cronic cited other cases where giving up of a potential *bona fide* defense came in exchange for a benefit: *e.g.,* Parker v. North Carolina, 397 U.S. 790, 797 (1970) (where the client risked a capital sentence, there was no IAC in advising the defendant to forgo motions and plead guilty to charges leading to a life sentence); McMann v. Richardson, 397 U.S. 759, 770-771 (1970) (three defendants pleaded guilty to lesser offenses than charged; held, not IAC to not pursue the question of the voluntariness of their confessions); *compare* Brady v. United States, 397 U.S. 742, 756 (1970) (upholding a guilty plea that was a voluntary and intelligent choice *among the alternatives available* to a defendant); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 363-365 (1978) (plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial). Other cases have upheld counsel's strategic choices when grounded in reasonable advocacy for the client.[29]

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[29] Bell v. Cone, 535 U.S. 685, 701-702 (2002) (unreasonable for the federal court to deem counsel's choice in waiving argument a non-tactical decision given the tactical upside for the client in not doing so); Yarborough v. Gentry, 540 U.S. 1 (2003) (no IAC stemming from an underwhelming

The Warden cites no case and Mirzayance has found none that holds counsel met his Strickland duty of advocacy by foregoing a bona fide defense for nothing in return. Wiggins, supra, recognizes counsel serves the client by "making an informed choice among possible defenses." Wiggins, supra, at 525. Only the Warden urges a rule that counsel is competent by foregoing his client's bona fide defense for nothing.

The remaining question is that of Strickland prejudice, which the Circuit majority determined in Mirzayance's favor, noting the prospect of "four defense experts testifying during the NGI phase that Mirzayance was legally insane at the time of the murder," Pet. App. 7, which constituted a "significant potential for success." Id., at 8. That is the only rational conclusion available under Strickland.[30]

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final argument by defense counsel; deemed reasonable because "[f]ocusing on a small number of key points may be more persuasive than a shotgun approach." Id. at 7.)

[30] The concurring and dissenting opinion asserts that "the record certainly demonstrates that there is substantial ground for a difference of opinion as to whether Mirzayance has any chance of succeeding on his insanity defense." Pet. App. 16. With respect, that is an incorrect focus, because it applies to virtually every case. At an NGI trial in this case, this Court could well presume that the jury arguments of the prosecutor and defense counsel would reflect such a difference of opinion. The proper focus is that there is no substantial ground for a difference of opinion regarding the availability of substantial evidence that Mirzayance believed his conduct justified due to his psychotic state, and that such evidence was ample to support an NGI verdict. Those objective factors are paramount in a Strickland prejudice analysis, not subjective factors such as how a jury

The Warden's argument that "there was strong evidence in the state-court record of Mirzayance's obvious consciousness of guilt", Pet. Brf. 18, refers almost entirely to post-homicide conduct and statements, which the defense experts were well aware of and which did not cause them to retract their opinions regarding insanity. The Warden fails to acknowledge that at the federal evidentiary hearing one of the prosecution's mental health experts, Dr. Anderson, testified to an opinion of Mirzayance's mental state at the time of the homicide that was consistent with legal insanity – Dr. Anderson testified that in his opinion, because of Mirzayance's psychosis, "he felt that he was justified in doing what he was doing." ER3 53-54.

Dr. Anderson's explanation of his understanding of Mirzayance's mental state at the time of the homicide in fact aligns him with the defense retained experts who viewed Mirzayance as insane under the California test in light of the evidence that he did not know the wrongfulness of his act at the time of the homicide. The fact Mirzayance subsequently came to his senses, went to the police, and confessed to the commission of the crime, was consistent with the point Dr. Anderson made that Mirzayance was fortunate in his "ability to recuperate or recover from a psychotic episode." ER3 53.

Under these circumstances, the only rational conclusion regarding Strickland prejudice was that the insanity defense was sufficiently viable to undermine confidence in the existing judgment.

The Warden argues against the Circuit majority's prejudice determination on the basis that

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might actually respond to the conflicting inferences arising from the evidence.

"[t]here is no direct evidence that Mirzayance entertained such a belief" that he needed to defend himself, arguing that "[h]e never submitted a declaration to that effect; there has never been a suggestion that he would have testified to that effect; and there is no evidence that he actually made such a claim to the defense experts." Pet. Brf. 40. That is both factually inaccurate and a red herring. The psychiatric experts who were conversant with the effects of schizophrenia, regardless of the psychotic defendant's capacity to verbalize his symptoms and feelings, were prepared to testify that, *e.g.,* "the psychotic thought process present in Mr. Mirzayance resulted in a gross misperception of reality and a consequent potential lack of understanding of the wrongfulness of his conduct at the time of the homicide." Dr. Richard Romanoff. Ex 4, p. 3.

However, Mirzayance did convey his subjective feelings at the time of the homicide to the examining psychiatrists, who incorporated them into their opinions. Dr. Bennett Blum's declaration stated, based on his interviews with Mirzayance, that his "psychotic and paranoid perspective made him think he needed to defend himself against a non-existent, life-threatening attack." Ex. 1, p. 2.

To the extent that the Warden is currently asserting that there was a question of fact whether the insanity defense would prevail, he misperceives § 2254(d) review. The operative question is whether any reasonable court would have to conclude that Mirzayance had a reasonable chance of prevailing, notwithstanding the questions of fact raised by the Warden. The Circuit majority correctly answered that question in the affirmative, Pet. App. 8, concluding that the record established that the

insanity defense had a "significant potential for success." Ibid.

C. The District Court's Fact-Findings Do Not Support the State Court Disposition, and the Circuit Majority Did Not Improperly Supplant Them.

1. The prejudice finding.

The Warden begins section C of its brief (pp. 45-50) by stating the Circuit "supplanted" certain findings of the district court and ignored others. Regarding prejudice, it is the Warden who has ignored the district court finding that the insanity defense was substantial and credible. Pet. App. 8, 100.

Instead, the Warden claims that "[t]he additional evidence adduced at the evidentiary hearing verified the absence of Strickland prejudice, Pet. Brf. 46, cites competing evidence and mischaracterizes it in part. It cites the testimony of Drs. Sandhu and Anderson, "both of whom found Mirzayance sane." Id. at 46. This overlooks the actual testimony of Dr. Anderson who labored under a misconception on the insanity standard in his belief that if the defendant understood he was doing bodily harm, he was sane. More importantly, his testimony regarding Mirzayance's mental state at the time of the homicide is entirely supportive of an NGI finding. EH3 53-54.

The Warden makes a dramatic argument regarding Dr. Anderson's testimony that is contrary to the record and not part of the district court's

factual findings.[31] The Warden contends that Dr. Anderson elicited an admission from Mirzayance that he knew his conduct was wrongful at the time of the homicide and further implies that the district court made a finding to this effect. Neither position is supported by the record.

Dr. Anderson asked Mirzayance in a jail interview several months after the homicide whether Mirzayance thought it was right or wrong to kill Melanie, and Mirzayance appropriately answered that it was wrong. That portion of the testimony was ambiguous as to whether Dr. Anderson was reporting Mirzayance's perspective at the time of the interview, or at the time of the homicide.

Counsel for the Warden elicited a clarification that Mirzayance's acknowledgment of wrongdoing related to the time of the interview. At the time of the homicide, Dr. Anderson testified Mirzayance "felt that he was justified in doing what he was doing because of the psychotic condition he was under.... he felt that he was justified in not doing anything wrong from his interpretation, not from the legal interpretation." EH3 53-54.

The Warden's argument to this Court is thus contrary to the record as established by the State's own counsel's questioning of Dr. Anderson at the

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[31] "Most significant, as the district court noted, only Dr. Anderson directly asked Mirzayance what he was actually thinking [no citation] at the time of the crime. By 'direct query,' he discovered what Mirzayance's experts studiously avoided: evidence that by itself would have doomed an insanity defense to failure. Dr. Anderson elicited from Mirzayance his admission that the felt his murderous actions of shooting and stabbing Melanie *'were wrong at the time of [the] offense.'* "Pet. Brf. 46; emphasis in original.

hearing. To the extent that the Warden implies the district court made a finding that Mirzayance acknowledged to Dr. Anderson a knowledge of wrongfulness at the time of the homicide, the Warden is mistaken. Nowhere in the "Findings" section did the R&R refer to or rely on Mirzayance's interview with Dr. Anderson at all, much less as a damning or dooming admission.[32] Rather, the R&R found that the NGI defense was credible.

Next, the Warden cites to the district court's "key findings" without reference to the court's ultimate finding: "As witnesses could have testified credibly and therefore perhaps successfully – even though subject to potential strong cross-examination – prejudice is established, as the Court's confidence in the verdict therefore is undermined." Pet. App. 100. The district court's findings relevant to the prejudice prong are clearly consistent with the Circuit majority's analysis and conclusion.

2. The unreasonable performance finding.

The Warden contends that the Circuit majority failed to credit the district court's factual finding that "Wager's decision was carefully considered, not rashly made." Pet. Brf. 50, citing Pet. App. 68-71. The Warden is fixated on a red herring irrelevant to the validity of the judgment. For Sixth Amendment purposes, it does not matter whether trial counsel made a particular decision while in an emotionally charged state or while calm

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[32] The R&R's section devoted to the summary of facts refers to Dr. Anderson's testimony at EH3 10-12, but not in sufficient detail to include the explanation concerning Mirzayance's statement as elicited by the State. Pet. App. 65.

and deliberative. It does not matter whether counsel mentally labored over the decision for hours or days, or whether counsel made the decision in an instant of intuition. The only issue for Sixth Amendment purposes is whether the decision was objectively reasonable. The record here establishes that it was objectively unreasonable because Wager made the unreasonable and ill-informed decision that the first-degree verdict precluded all hope for a successful NGI finding, and then waived the defense knowing that decision afforded no benefit to Mirzayance.

Thus, the Warden may have identified a divergent characterization between the district court and the Circuit majority regarding Wager's subjective emotional state at the time he abandoned the NGI defense. That, however, is irrelevant to Sixth Amendment question of whether his decision was objective unreasonable.

The Warden similarly pursues an irrelevant disagreement as to the courts' respective characterizations of whether Mirzayance's parents refused to testify or merely expressed reluctance. For Sixth Amendment purposes, even if they unequivocally refused to testify, Wager's decision to abandon the NGI defense was still objectively unreasonable.

Next, the Warden points to the following testimony from the evidentiary hearing in support of the abandonment of the insanity defense.

1) Wager "hired multiple mental health experts to testify at the sanity phase that Mirzayance had committed the killing without premeditation or deliberation." That assertion makes no sense on its face because premeditation and deliberation were not at issue at the sanity phase. Wager had hired the multiple mental health

experts to testify at the insanity trial that Mirzayance was insane at the time of the homicide, and they were prepared to do so. The Warden may be referring to a very different comment by the district court, i.e., that the psychiatrists who were prepared to testify at the sanity phase had also expressed opinions relevant to the guilt phase issue of premeditation and deliberation. Pet. App. 71. This point goes nowhere. Pet. Brf. 46.

2) Wager recognized his witnesses had significant weaknesses and could be subjected to impeachment. Pet. Brf. 46. The experts all were aware of the consciousness of guilt conduct, most of which occurred after the homicide, and were confident in their opinions that Mirzayance was legally insane at the time of the killing. As Dr. Anderson explained, the fact that Mirzayance mentally reorganized after the killing demonstrated "he had the ability to recuperate or recover from a psychotic episode." EH3 52. Further, the R&R found the defense credible despite it being subject to strong impeachment.[33]

3) One expert was subject to impeachment for allegedly altering notes in another case. Pet. Brf. 47. This is a false premise. None of the experts Wager intended to call were subject to such impeachment. ER1 56. Wager testified he would have called Drs. Markman, Romanoff, Sharma and Blum. Ibid.

4 & 5) Wager's NGI strategy was to call the parents to evoke emotion and their refusal to testify made that strategy impossible. Pet. Brf. 47. As we

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[33] If the standard for going forward with a defense was that the presentation had to be unimpeachable, few would go forward.

have observed, Wager's strategy in this regard suffered from his misconception that the jury verdict on first-degree established Mirzayance's ability to distinguish between right and wrongful as an established fact. Thus, his "strategy" involving an attempt at jury nullification through the parents was misguided. The guilt phase jury made no finding on his client's ability to understand wrongfulness. Indeed, as the prosecutor twice correctly informed the jury (RT 768, 769), Mirzayance was conclusively presumed sane at the guilt phase.[34]

In California, a finding of insanity "does not negative an element of the offense" (People v. Hernandez, *infra,* 22 Cal. 4th 522), and neither does a finding of murder negate a finding of insanity. "A finding of such mental state [for the crime itself] does not foreclose a finding of insanity." Id., at 520. *See* People v. Ferris, 130 Cal. App. 4th 773, 780; 30 Cal. Rptr. 3d 426 (2005) ("insanity is not an element of a criminal offense").[35]

Had Wager understood California law, he would have known: a) that sanity was conclusively presumed at the guilt phase and not a jury consideration; b) that the "maturely and meaningful

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[34] *See* People v. Hernandez, 22 Cal. 4th 512, 520; 93 Cal. Rptr. 2d 509 (2000) ("[Calif.] Penal Code section 1026, subdivision (a), provides ... 'the defendant shall first be tried [on guilt] and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed'").

[35] People v. Hernandez, supra, 523: Insanity "is a plea to the effect that the defendant, even if guilty, should not be punished for an offense because he was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the offense."

reflection on the gravity of the crime" elements of first-degree murder had been abolished in 1982; c) that under post-1982 California law, an insane motivation to kill would not defeat the element of deliberation. Had he known this, he would have understood that the NGI defense did not rise or fall according to the jury's verdict on the murder charge.

Because the factual questions related to the elements of murder and insanity are so distinct in California, it is entirely consistent to have a first-degree murder conviction *and* an NGI finding. In Hernandez, the defendant was convicted of murder and then found insane. *See* People v. Villarreal, 167 Cal. App. 3d 450, 455; 213 Cal. Rptr. 179 (1985) ("appellant asks us to hold that an insane person, as a matter of law, cannot commit first-degree murder," but "[w]e decline to do so"); People v. Corona, 80 Cal. App. 3d 684, 713; 145 Cal. Rptr. 894 (1978) ("[i]t is, of course, elementary that the legal defense based on insanity embraces a question different from diminished capacity," a guilt phase defense to elements of the crime.)

Whether or not the parents testified did not diminish the force of the evidence supporting the defense, and it was Wager's misunderstanding of the law that made him believe the defense was hopeless and thus triable only to seek jury nullification if the parents testified.

6) Wager consulted with his co-counsel Boyle just before withdrawing the NGI plea and he agreed with Wager to withdraw the defense. Pet. Brf. 47. That Boyle agreed with Wager's decision does not make the decision reasonable in the face of the evidence supporting the defense and Wager's misunderstanding of the impact of the guilty verdict (that it meant the jury had already assessed wrongfulness).

Nor did the Circuit make its "own" findings. Pet. Brf. 47. First, the finding that the insanity defense was credible was not made by the Circuit, but by the district court. The credibility of the defense and Wager's fatal misunderstanding of the law undermined the reasonableness of his decision to abandon the NGI trial the morning it was to commence.

Even assuming the failure of the state to conduct a fact-finding hearing warrants AEDPA's "double deference" (Pet. Brf. 47), "deference is not abdication; it cannot shield counsel's performance from meaningful scrutiny or automatically validate challenged acts and omissions." People v. Dennis, 17 Cal. 4th 468, 541; 950 P.2d 1035 (1998).

Wager's testimony on why he believed the NGI trial "hopeless" may well explain why he abandoned the NGI defense, but also confirms that he had no objectively reasonable tactical basis for doing so. Rather, he erroneously assumed that by finding deliberation, the jury had necessarily determined that Mirzayance "maturely and meaningfully reflected on the gravity of the crime," a finding he equated with Mirzayance's being able to know right from wrong. Wager did not realize that the definition of first-degree murder had been amended in 1982 to remove any requirement that the jury find the defendant had "maturely and meaningfully reflected on the gravity of the crime."[36]

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[36] Wager's flawed understanding of the law in 1997 was also evident during final argument when he erroneously argued that Mirzayance's irrational motivation stemming from mental illness defeated the deliberation element. *E.g.*, RT 820 ("But because he's sick, he didn't weigh and consider the question of killing, the reasons for and against....") This could be argued until 1982, prior to

Without question, this amendment [in 1982] was intended to undo the Wolff decision.[37] By this amendment, the legislature, in effect, said mental abnormalities are irrelevant; no matter what the quality of the thought processes, if the accused thinks about the killing in advance and considers alternatives, premeditation and deliberation are proved.

Suzanne Mounts, "Premeditation and Deliberation in California: Returning to a Distinction Without a Difference," 36 U.S.F. L. Rev. 261, 304-305 (2002).[38]

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legislation dramatically overhauling the California Penal Code to remove most mental health considerations from the elements of murder. Wager's error led to prosecution argument and a jury instruction informing the jury that irrational thoughts due to mental illness did not mean one could not deliberate.

[37] Where the California Supreme Court held "'the true test [for premeditation and deliberation] must include consideration of the somewhat limited extent to which this defendant could maturely and meaningfully reflect upon the gravity of his contemplated act.'" People v. Wolff, 61 Cal. 2d 795, 821-822, 394 P.2d 959 (1964), *quoting* People v. Thomas, 25 Cal.2d 880 [156 P.2d 7](1945).

[38] The California State Legislature by Stats 1981 ch 404 § 7,p. 1593, effective September 13, 1982, amended Penal Code §189 to eliminate from murder definitions the concept of maturely and meaningfully appreciating the gravity of one's conduct. People v. Stress, 205 Cal.App.3d 1259, 1268; 252 Cal. Rptr. 913 (1988). This was part of a major revision of the Penal Code to eliminate much of the role of psychiatric testimony on the elements of murder. *See* Penal Code §§ 25, 28 and 29, eliminating the diminished capacity defense and circumscribing expert testimony on

As noted, whether Wager's decision to abandon the NGI is more appropriately characterized as "rash" or "carefully weighed" is irrelevant. The question is: was it unreasonable regardless of whether he anguished over it or came to a snap judgment. Clearly, Wager could have taken a day or a week to make that decision, but it would have been unreasonable at any time.

The undisputed facts leading to his decision to waive the defense were: he had an insanity defense developed over a period of one year prior to trial; it was well-supported by historical evidence of Mirzayance's childhood psychological problems; it was also supported by lay evidence of his paranoid behavior and paranoid thinking the week of (as well as the day of) the homicide; there was a wealth of expert testimony by very experienced and respected mental health professionals who could credibly testify that Mirzayance was insane at the time of the homicide; and Wager failed to understand that a finding of first-degree murder was not a finding tantamount to a finding sanity.

In light of these facts, and, and as the district court found, the supporting "witnesses could have testified credibly and therefore perhaps successfully" (Pet. App. 100), there was no rational basis for abandoning advocacy to surrender the defense.

Yet, the Warden asserts Wager did not arrive at his feeling of "hopelessness" about the defense out of anger,[39] or because of his mistaken belief

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the elements of the crime *See* Morse & Cohen, supra, 29, n. 23.

[39] Wager claimed he was angry the day of the NGI withdrawal in 1997 and was still angry about it seven years

about the law, but rather as a "practical matter." Pet. Brf. 49. Again, Wager's subjective feelings of hopelessness, of whatever origin, cannot make reasonable a decision to abandon an objectively viable defense for no benefit.

Giving up a credible defense based on a misunderstanding of the controlling law is an unreasonable decision under the Sixth Amendment, see Kimmelman v. Morrison, supra; [Terry] Williams v. Taylor, supra.

The issue of the parental "refusal" was also unimportant to the ultimate issue in this case. Wager unreasonably seized upon it that morning as his reason to abandon the defense. But he had already made the decision the trial was hopeless based on his very flawed legal understanding of the jury finding of first-degree murder.

Even so, the "reluctance" of the parents to testify the morning of trial, was not the functional equivalent of a "refusal." Mirzayance's father, according to trial counsel, changed his mind, and said he would testify, but then said that he wouldn't. ER1 106. As the Circuit noted, counsel could have responded to the alleged "reluctance" and used any number of approaches to effect a reconsideration. Pet. App. 7. The Circuit thus acknowledged the lower court's factual finding that the parents' expressed pronounced reluctance to testify that morning, but simply noted that a competent attorney would have attempted to persuade them otherwise. Pet. App. 7.

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later when he testified in 2004. RT 105. He testified he had an angry conversation with Mirzayance's father in the courthouse just before the withdrawal. RT 106. He was not sure whether his "anger at the parents [made him] so emotional that [he] lost [his] sense of advocacy." ER1 124.

The crux of the Circuit's holding was that Wager's decision to give up the NGI defense was unreasonable. "Counsel's belief that Mirzayance's interests would not be advanced by conducting the insanity phase was groundless." Pet. App. 7. His decision was not a "tactical choice," but the sacrifice of a defense based on a misunderstanding of the law. Pet. App. 6, n. 1.

Even assuming that the Magistrate's "findings" that Wager's decision was not rash and that the parents refused to testify were not clearly erroneous, Wager's decision was still objectively unreasonable. While attorneys are given great leeway in charting the course of a client's defense through various alternatives, the Sixth Amendment imposes one requirement: defense counsel must make objectively reasonable choices. *See* Strickland, supra at 688.

Conclusion

The record below amply supports the Circuit's holding of prejudicial IAC. There was an unusual and strong consensus among the various mental state experts supporting an NGI finding. Moreover, the near consensus of experts was supported by the corroborating evidence of Mirzayance's childhood psychological problems, his treatment by child psychologists, the parents' history concerning Mirzayance's childhood psychological problems as presented through Dr. Satz, and the lay witness testimony of Laurent Meira and the Ookhtens relatives about Mirzayance's paranoid behavior the week and day of the homicide.

Under any standard of prejudice, the evidence presented a likelihood of a different result sufficient to undermine confidence in the outcome. The decision below should be affirmed.

Sept. 29, 2008 Respectfully submitted,

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REPLY BRIEF

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No. 07-1315

Supreme Court, U.S.
FILED
NOV 3 - 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

MICHAEL A. KNOWLES, Warden,
Petitioner,

v.

ALEXANDRE MIRZAYANCE,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent Mirzayance does not seriously defend the Ninth Circuit's grant of habeas relief under this Court's precedent, which commands that review of ineffective-counsel claims under 28 U.S.C. § 2254 must be "highly deferential—and doubly deferential when it is conducted through the lens of federal habeas." *Yarborough* v. *Gentry*, 540 U.S. 1, 5 (2003) (per curiam). Acknowledging that relief is unavailable under § 2254(d) as interpreted by this Court, he is reduced to arguing that the deferential standard of habeas review, enacted by Congress as a cornerstone of AEDPA, should somehow be simply ignored. Inevitably, he relies on the spurious "nothing to lose" notion that can form no part of § 2254(d) review, insisting that Wager was duty-bound to present an affirmative NGI defense regardless of his professional judgment as to the merits of such a defense. And, even in arguing for "no deference" or "less deference" review despite § 2254(d), he proffers a view of the evidence that was discredited by the district court. Mirzayance is wrong on all counts.

I. UNDER 28 U.S.C. § 2254, THE CALIFORNIA COURTS' REJECTION OF MIRZAYANCE'S CLAIM IS CONCLUSIVE AND WAS CORRECT.

Mirzayance's claim, that trial counsel Wager was obliged by the federal Constitution to present a state-law affirmative defense of not guilty by reason of insanity (NGI), fails under *Strickland* v. *Washington*, 466 U.S. 668 (1984), and fails even more obviously under the "doubly-deferential" *Strickland* analysis required by 28 U.S.C. § 2254(d). See *Gentry*, 540 U.S. at 5; *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004).

The state courts' denial of the claim was objectively reasonable and conclusive, first, under *Strickland*'s clearly

established "prejudice" test. The expert opinions Mirzayance submitted to the state courts could not be persuasive once the jury determined that Mirzayance had premeditated and carefully deliberated the murder, a determination that signaled its rejection of defense opinion testimony about Mirzayance's alleged mental impairments. Nor could those opinions undermine confidence in the strong evidence in the state-court record of Mirzayance's consciousness of guilt. That evidence showed his self-conscious efforts to conceal his involvement in the murder, and his repeated acknowledgments just after the crime, to a friend and to police, that the killing was wrong.

The state courts' denial of the claim also proves conclusive under *Strickland*'s clearly established "performance" test. The state-court record shows that Wager's considered decision, approved by Mirzayance and made after consultation with co-counsel, was a "reasonable choice" under difficult circumstances. See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477, 479 (2000). Wager made his decision only after a thorough investigation that far exceeded what the Constitution requires. Wager retained eight doctors to evaluate Mirzayance's mental health, employed jury consultants, conducted mock trials on mental health defenses, hired an investigator who interviewed Mirzayance's friends and associates, and conferred regularly with Mirzayance's parents and their personal attorneys. Wager reevaluated the case following the jury's first-degree murder verdict, and discussed the NGI problem with his experienced co-counsel and a retained doctor, before making his final assessment that the defense could not meet its NGI burden of proof.

In granting relief despite the state courts' rejection of Mirzayance's claim on that record, the Ninth Circuit failed to heed the import of this Court's order for it to reconsider this case in light of § 2254(d) as construed in *Carey* v.

Musladin, 127 S. Ct. 649 (2006). Instead, the Ninth Circuit again reviewed the case without regard for whether the state-court adjudication was at least "reasonable" under *Strickland*. Indeed, departing even further from § 2254(d), the Ninth Circuit improperly applied a novel "sole defense/nothing to lose" corollary to the *Strickland* standard that was not part of the "clearly established Federal law" governing habeas corpus review and that is not supported by the Sixth Amendment. Finally—having failed to recognize that relief was precluded under § 2254(d)—the Ninth Circuit also failed to defer under Federal Rule of Civil Procedure 52(a) to well-supported district court factual findings that compelled rejection of Mirzayance's claim in any event. This Court now should reverse the Ninth Circuit judgment outright.

II. MIRZAYANCE'S ARGUMENTS FIND NO SUPPORT IN THE LAW UNDER 28 U.S.C. § 2254(D) OR IN THE FACTS PRESENTED TO THE STATE AND FEDERAL COURTS.

A. Mirzayance Incorrectly Relies, As The Ninth Circuit Did, On A Spurious "Nothing to Lose" Extension of This Court's Clearly Established *Strickland* Test.

Mirzayance's brief shares a central flaw with the reinstated panel opinion: it addresses only the question of error under *Strickland*, and it does so by resorting to a "nothing to lose" rule that is not part of *Strickland*. Like the panel opinion, Mirzayance's brief offers a perfunctory citation to § 2254(d)(1), but then never discusses the threshold and dispositive question under the habeas statute: whether the *state-court* decision in light of the *state-court* record was at least "reasonable" under the clearly established law of *Strickland* v. *Washington*. See *Wright* v. *Van Patten*, 128 S. Ct. 743, 747 (2008); *Musladin*,

127 S. Ct. at 654; *Lockyer* v. *Andrade*, 538 U.S. 63, 71, 75 (2003).

Although he purports to disclaim it—like the Ninth Circuit panel purported to do—Mirzayance advances the same non-*Strickland* "nothing to lose" rule that the dissenting judge twice protested. Pet. App. 14, 31-33. As Mirzayance rewords it, "counsel has a duty to present a substantial viable defense where there was an objective prospect for success and no strategic or other benefit in abandoning it." RBM 30. The parties agree, then, on this much: Mirzayance and the Ninth Circuit would impose on Wager a "duty" to proceed with the alleged NGI defense *regardless* of his professional judgment as to its merits and regardless of whether there was any "reasonable probability" of its success.

But this per se rule of performance, with its watered-down or non-existent rule for prejudice, differs radically from the clearly established constitutional rule for effective counsel adopted by this Court in *Strickland*. The "rule" proffered by Mirzayance and the Ninth Circuit cannot be reconciled with this Court's recognition that attorneys must simply make a "reasonable choice." *Roe*, 528 U.S. at 479. It is also inconsistent with this Court's recognition that attorneys are not obligated to advance all nonfrivolous claims, or defenses, or arguments, even though they theoretically might succeed and thus might be deemed "viable." See *Jones* v. *Barnes*, 463 U.S. 745, 751-54 (1983); *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985).

No holding of this Court requires the States to decide ineffective-counsel claims under such a mechanical "rule," even as Mirzayance describes it. A rule that counsel is ineffective for declining to proceed with an NGI plea just because there is "no tactical advantage to be gained" by not doing so, and the plea possibly might have succeeded, is *not* "clearly established Federal Law as determined by the

Supreme Court." 28 U.S.C. § 2254(d)(1); see *Van Patten*, 128 S. Ct. at 747; *Musladin*, 127 S. Ct. at 654; *Schriro* v. *Landrigan*, 127 S. Ct. 1933, 1942 (2007). So it cannot serve as a basis for granting habeas relief in this case.

B. Mirzayance's And NACDL's Eccentric Reinterpretations Of 28 U.S.C. § 2254 Lack Support In The Statutory Language, In Congress's Purpose In Enacting AEDPA, And In This Court's Habeas Corpus And AEDPA Jurisprudence.

Apparently recognizing the impossibility of defending the Ninth Circuit's fatal failure to apply deference—and "double deference"—to the state-court adjudication of his *Strickland* claim, Mirzayance abandons his argument that he is entitled to relief under "the usual § 2254(d) deferential approach." RBM 33-34. Instead, he argues for the first time that "a different type of analysis, necessarily *less deferential* to the state court" is warranted because the California courts summarily adjudicated his claim without holding an evidentiary hearing or providing a statement of reasons, and because the federal court in any event held an evidentiary hearing on his claim. RBM 34 (italics added).[1/]

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1. The amicus curiae brief of the National Association of Criminal Defense Lawyers (NACDL) also argues that a federal habeas court may apply a "sliding scale" of deference to a state-court adjudication commensurate with how "reasoned" a state court decision appears to a federal court conducting habeas review. See *id.* at 17-18, 25. For a summary state-court adjudication like in this case, NACDL invents this test:

> [T]he federal court would first be obligated to independently assess the merits of the constitutional question under § 2254(a). If that independent assessment reveals a constitutional violation, the federal court would not be obliged to assume that the state court's result, though decidedly wrong, was nevertheless produced by an analysis that was

Mirzayance baldly concludes that "the usual § 2254(d) deferential approach must be modified and adapted." RBM 34, 38.

Even this effort is ultimately unavailing. For, as explained above and in the Warden's opening brief, the state courts' rejection of Mirzayance's claim was not merely reasonable but also correct, and cannot be successfully challenged by resorting to a "nothing to lose"-type rule.

In any event, Mirzayance's view of § 2254(d) deference as disposable lacks merit.[2]

1. *Mirzayance's Statutory Arguments Come Too Late.*

It is, first of all, too late for Mirzayance and amicus NACDL to present these arguments. Mirzayance never raised them in the courts below. To the contrary, he has acknowledged that federal court review of his claim was governed by this Court's well-established explanation of

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> consistent with or involved a reasonable application of clearly established federal law, and was based on a reasonable determination of the facts. Instead, the federal court would be permitted to draw the more natural and intuitive conclusion that a state court decision which reaches an incorrect result on an issue of federal constitutional law and does not even undertake to justify that result by articulating reasoning which attempts to come to terms with the governing law and operative facts is tainted by at least one of the defects enumerated in § 2254(d)(1) and (2). The combination of constitutional error found under § 2254(a) and adjudicatory defect inferred under § 2254(d) would authorize issuance of the writ.

Id. at 25-26.

2. Related issues are pending before this Court in *Bell v. Kelly*, No. 07-1223.

the § 2254(d) standard. See Opp. to Cert. 32-33. And this Court has never endorsed a "sliding scale" of lesser deferential review, or ever suggested that deferential review for a claim adjudicated on the merits under § 2254(d) is dependent upon whether the state court provided an evidentiary hearing or a written explanation in denying a collateral claim against a final judgment. Nor did Mirzayance raise these arguments in opposition to the Warden's certiorari petition. See Sup. Ct. R. 24.1(a). Finally, the certiorari petition does not raise or fairly subsume the question of whether the federal court was entitled to grant a writ on grounds that it could afford less deference to the state-court adjudication than that required under the "contrary to," "unreasonable application of," and "clearly-established Federal law" provisions of § 2254(d) as expounded in this Court's precedents. See Sup. Ct. R. 14.1(a).

2. *Section 2254(d) Deferential Review Is Not Conditioned On State-Court "Statements of Reasons" Or State-Court Evidentiary Hearings.*

Neither a state-court evidentiary hearing, nor a state-court "statement of reasons" for denying relief, is a prerequisite for the deferential federal review of the state court's ultimate ruling under § 2254(d). Certainly, Congress included no language in AEDPA specifically imposing such alleged requirements. Where Congress in AEDPA actually sought to condition new protection for state judgments on the state courts' compliance with certain procedures, it has shown that it knows how to set out express provisions for that. See, *e.g.*, 28 U.S.C. § 2261. It did no such thing here.

a. Like most if not all state judicial systems, California courts have made clear their procedures for considering habeas corpus claims. In essence, California courts deal

with them as if by way of motion to dismiss or summary judgment, generally assuming the petitioner's allegations to be true and then faithfully bringing to bear on them the federal constitutional law as the state courts interpret it. The Ninth Circuit has recognized, and Mirzayance does not dispute, that state-court rulings rendered through such procedures are "adjudications" on the "merits" of the federal claim. See *Griffey* v. *Lindsey*, 345 F.3d 1058, 1066, *vacated as moot*, 349 F.3d 1157 (9th Cir. 2003); *Visciotti* v. *Woodford*, 288 F.3d 1097, 1104-05 (9th Cir.), *rev'd on other grounds*, 537 U.S. 19 (2002); *Hunter* v. *Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc); and see, *e.g.*, *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *People* v. *Romero*, 883 P.2d 388, 391 (Cal. 1994). That is, by its plain terms, all that § 2254(d) requires in order to trigger deferential review by the federal habeas court. It would be absurd to suggest that, despite California's long-standing and recognized procedures, there was no adjudication on the merits of Mirzayance's ineffective-counsel claim simply because there was no state-court evidentiary hearing or statement of reasons.

Neither Mirzayance's nor NACDL's brief identifies any federal circuit that has adopted such a judge-made evisceration of the § 2254(d) limitations on habeas corpus adopted by Congress. To the contrary, in the twelve years since the adoption of AEDPA, the federal appellate courts have consistently found summary or unexplained denials of collateral relief by the state courts to be merits adjudications subject to full deferential review under § 2254(d). *E.g.*, *Greene* v. *Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2002); *Wright* v. *Secretary*, 278 F.3d 1245, 1254 (11th Cir. 2002); *Sellan* v. *Kuhlman*, 261 F.3d 303, 310-12 (2d Cir. 2001); *Bell* v. *Jarvis*, 236 F.3d 149, 158-62 (4th Cir. 2000) (en banc); *Harris* v. *Stoval*, 212 F.3d 940, 943 (6th

Cir. 2000); *Aycox* v. *Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999); *Schaff* v. *Snyder*, 190 F.3d 513, 523 (7th Cir. 1999); *James* v. *Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). Section 2254(d) mandates deference to the state court's result, not its reasoning. *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam) (section 2254(d) does not even require awareness of this Court's precedent, so long as neither the reasoning nor the result of the state-court decision contradicts them). To condition deference on the quality of the state court's reasoning, as Mirzayance and NACDL propose, "would place the federal court in just the kind of tutelary relation to the state courts that the recent amendments are designed to end." *Henon* v. *Cooper*, 109 F.3d 330, 335 (7th Cir. 1997).

The § 2254(d) standard, moreover, applies logically to both "unexplained" decisions and to non-evidentiary-hearing decisions. The § 2254(d) inquiry is simply whether the state court's adjudication of the claim resulted in a "decision" that is "contrary to" or that involved an "unreasonable application" of "clearly established Federal law." A reviewing court discerns this—as countless federal courts have done over the years—by considering the evidence presented to the state court in light of the petitioner's legal claim and determining whether the state court's decision reasonably conforms with this Court's precedents.

With respect to "unexplained" rulings, an example is presented by *Lambrix* v. *Singletary*, 520 U.S. 518 (1996). There, this Court had no difficulty denying relief under the "new rule of constitutional law" test of *Teague* v. *Lane*, 489 U.S. 255 (1989)—a standard very much like that of "clearly established Federal law" under § 2254(d), *Williams* v. *Taylor*, 529 U.S. 362, 410, 412 (2000)—even though the *state court* had barred the prisoner's claim on procedural grounds without invoking any constitutional rule or

reaching the merits at all. 520 U.S. at 522-25.

The process is also like that employed every day by the federal appellate courts in reviewing federal district court decisions that might not be accompanied by a written or oral analysis of the defendant's factual claim in light of the governing law. When reviewing a lower court's ruling deferentially, the federal appellate courts traditionally assume that the lower court made any and all determinations required to support its ruling—and, indeed, the appellate court will uphold the ruling on any available legal or factual ground, even if the lower court ignored that ground and erroneously relied on different grounds altogether. See *United States* v. *Wheaton*, 517 F.3d 350, 369 (6th Cir. 2008) (although the district court incorrectly described evidence underlying its finding, the existence of such evidence in the record supports the finding); *Hammon* v. *DHL Airways, Inc.*, 165 F.3d 441, 445 (6th Cir. 1999) (appellate court may affirm the district court where it reached the right result for the wrong reason); *Payne* v. *Churchich*, 161 F.3d 1030, 1038 (7th Cir. 1998) (if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason); *United States* v. *Twine*, 853 F.2d 676, 681 (9th Cir. 1988) (appellate court may affirm a district court ruling that lacks specific findings of fact or law if the record reasonably supports the result). It would be anomalous if the federal courts were to afford the state courts less deference. See *Francis* v. *Henderson*, 425 U.S. 536, 542-43 (1976).

It would be especially anomalous to do so in habeas corpus cases, where the state courts stay open, beyond the call of the Constitution, to consider a prisoner's claim in collateral proceedings attacking a final judgment. There is no reason state courts then should be saddled with the expenditure of scarce judicial resources to write full

written opinions, in dealing with such attacks well after the "main event" of the trial, as well as the direct appeal, have concluded.

b. As with the alleged need for "explained" decisions, it would be costly, impractical, and unnecessary for state courts to hold evidentiary hearings for every post-conviction claim presented by state prisoners. Habeas petitioners do not always request evidentiary hearings. And, in cases such as this one, in which a team of post-conviction attorneys presents voluminous evidence, a court may reject a claim—as a matter of law on the claim as alleged—without an evidentiary hearing devoted to proving alleged facts that as a matter of law would be insufficient to make out a constitutional violation anyway.[3] Recognizing

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3. In support of his proposed modifications to § 2254, Mirzayance wrongly conflates the California Courts' summary adjudication with a "refusal" to permit Mirzayance to develop the factual basis of his claim. See RBM 34, 38. The adequacy of a state's procedural mechanism for presenting a claim is not part of the § 2254(d) analysis. See *Miller-El*, 537 U.S. at 358-59 (Thomas, J., dissenting) (noting that the deference afforded to state court factual determinations pursuant to § 2254(e)(1) cannot be evaded "by attacking the process employed"). In any event, deciding the claim without an evidentiary hearing was not a "refusal" to permit factual development. All the claim-defining factual allegations and supporting evidence considered by the federal courts were presented by Mirzayance in state habeas corpus proceedings in the form of voluminous documents and declarations from Wager, co-counsel Boyle, the defense mental health experts, the defense investigators, a "*Strickland* expert," Mirzayance's parents, the family's attorneys James and Eric Lund, Mirzayance's childhood teachers in France, and several of Mirzayance's friends. See, *e.g.*, Exs. 1-22. The direct testimony of the key witnesses at the federal evidentiary hearing consisted of the *same declarations* filed in state court. To the extent Wager provided more testimony at the hearing, the additional details were consistent with Wager's state-court declaration. Moreover, none of the facts upon which state courts could have relied were contradicted at the federal evidentiary hearing.

this, virtually every state provides for possible summary disposition of such claims.[4] Federal habeas rules similarly provide for dismissal of habeas petitions without an evidentiary hearing. See Rules 4 and 8(a) of the Rules Governing Section 2254 Cases in the Federal District Courts; see also Fed. R. Civ. P. 56(c).

Mirzayance's complaints about his own state habeas proceedings are particularly unconvincing. California habeas corpus courts provisionally assume that a prisoner's factual allegations, if adequately pled, are true for purposes of determining if he has made out a prima facie case for relief. *Duvall*, 886 P.2d at 1258-59; *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993); *In re Lawler*, 588 P.2d 1257, 1259 (Cal. 1979). For the prisoner, that is better than an evidentiary hearing in which the state may disprove his factual claims. Here, Mirzayance presented to the state

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4. See, *e.g.*, Ala. R. Crim. P. 32.7(d); Alaska R. Crim. P. 35.1(f); Ark. R. Crim. P. 37.3; Ariz. R. Crim. P. 32.6(c); Cal. Penal Code § 1484; Colo. R. Crim. P. 35(c)(3)(IV); Del. Super. Ct. Crim. R. 61(d) & (h); Fla. R. Crim. P. 3.850(d); Ga. Code Ann. § 9-14-40, et seq.; Haw. R. P. P. 40(f); Idaho Code § 19-4906(b)-(c); Ill. Comp. Stat. § 5/122-2.1(a)(2); Ind. Post-Conviction Rule 1(4)(g); Iowa Code § 822.6; K. S. A. § 60-1507; Ky. R. Crim. P. 11.42; La. Code Crim. art. 928-929; Mo. R. Crim. P. 70; Mass. R. Crim. P. 30(c)(3); Mich. R. Crim. P. 6.504(B); Minn. Stat. § 590.04; Miss. Code Ann. § 99-39-11(2); Mo. R. Crim. P. 29.15(h); Mont. Code Ann. § 46-21-201; Neb. Rev. Stat. § 29-3001, *State* v. *Gray*, 612 N.W.2d 507 (Neb. 2000); Nev. Rev. Stat. § 34.770; N.J. Rules of Court 3:22-9; N.M. R. Dist. Ct. R.C.R.P. 5-802E(1); N.Y. Crim. Pro. Law § 440.30(d) and (4); N.C. Gen. Stat. § 15A-1420(c)(1), (c)(3); N.D. Cent. Code § 29-32.1-09; Ohio Rev. Code Ann. § 2953.21; Or. Rev. Stat. § 138.525; Pa. R. Crim. P. 907(1), 909(B); R.I. Gen. Laws § 10-9.1-6(b) (1956); *Wood* v. *State*, 184 S.E.2d 702, 704 (S.C. 1971); Tenn. Code Ann. §§ 40-30-106, 40-30-108; Tex. R. Crim. P. 11.07; Utah Code Ann. § 78B-9-101, et seq., Utah R. Civ. P. 65C; Vt. Stat. Ann. 13, § 7131, et seq., *In re Gould*, 852 A.2d 632 (Vt. 2004), *In re Thompson*, 697 A.2d 1111 (Vt. 1997); Wash. Rev. Code Ann. § 10.73.140; W. Va. Code Ann. § 53-4A-3(a); Wis. Stat. Ann. § 974.06(3); Wyo. Stat. Ann. § 7-14-101, et seq.

courts the same factual allegations, documentary evidence, and declarations of key witnesses that he later presented in his habeas corpus petition in the federal court. The California Court of Appeal and the California Supreme Court summarily rejected Mirzayance's ineffective-counsel claim on the merits without requiring him to prove his factual assertions at an evidentiary hearing—just like the federal district court rejected that claim as a matter of law when first confronted with it. Pet. App. H, I, J.

This Court's opinion in *Panetti* v. *Quarterman*, 127 S. Ct. 2842 (2007), relied upon by Mirzayance, does not compel a contrary conclusion. See RBM 37. *Panetti* involved a claim in which the petitioner alleged he was not competent to be executed under the standards of *Ford* v. *Wainwright*, 477 U.S. 399 (1986). In addressing Panetti's *Ford* claim, this Court determined it was "unencumbered by the deference AEDPA normally requires" because the state court's "failure to provide the procedures mandated by *Ford* constituted an unreasonable application of clearly established law as determined by this Court." 127 S. Ct. 2855. This result hardly compels the application urged by Mirzayance—that a federal habeas court may apply a "modified" and "less deferential" version of § 2254(d) if it finds California's habeas corpus procedures inadequate. RBM 34, 37. Unlike the constitutional competency "procedures mandated by *Ford*" that were at issue in *Panetti*, there is no constitutional rule or "clearly established Federal law" dictating that state habeas courts must issue explained decisions or provide evidentiary hearings when rejecting a state prisoner's collateral attack on the validity of a final criminal judgment. See *Pennsylvania* v. *Finley*, 481 U.S. 551, 557, 559 (1987) (states have no obligation under the Constitution to provide for collateral attack upon a final criminal judgment; when they opt to do so, they need not implement any particular

process for a prisoner to pursue collateral relief).

This Court has recognized that state courts take seriously their obligation to enforce the Constitution as "coequals" with the federal courts in their ability to interpret it and apply its terms. *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). Congress's enactment of AEDPA stands as testimony to its solemn judgment that the state courts are to be trusted as the primary enforcers of the Constitution in state criminal cases. A plain reading of § 2254(d)—as opposed to Mirzayance and NACDL's suggested "modification"—is consistent with the purposes of AEDPA to prevent federal habeas retrials and restrict the issuance of the writ. As this Court has explained, AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas retrials and to ensure that state-court convictions are given effect *to the extent possible under law.*" *Bell* v. *Cone*, 535 U.S. 685, 693 (2002) (italics added). Cutting back on AEDPA's solicitude for state-court judgments, for state-procedure reasons such as those given by Mirzayance and NACDL, would contradict Congress and risk insult to the state courts.

The adequacy of a state's procedural mechanism for presenting a claim is not part of the § 2254(d) analysis. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 358-59 (2003) (Thomas, J., dissenting). A state's post-conviction process has no bearing on whether the state court's merits adjudication was "contrary to, or involved an unreasonable application of, clearly established federal law." § 2254(d)(1).

3. *Habeas Corpus Courts May Not Circumvent § 2254(d) Deferential Review Of State-Court Decisions By Receiving New Evidence In Federal Hearings.*

Mirzayance also contends that a "modified application of § 2254(d) is required" in his case because an evidentiary hearing in federal court assertedly developed some different facts to support his claim. RBM 35. In place of the "double deference" standard for state-court rulings on *Strickland* claims, he manufactures his own test:

> [T]he federal court can ask whether the state court's result is wrong and, if so, the federal court can grant relief on the ground that a state court decision "involves an unreasonable application" of federal law (within § 2254(d)(1)) when the state court has so far deviated from the proper process for applying federal constitutional law as to make an incorrect ruling on a federal claim . . . .

RBM 37. But this test, seemingly borrowed from the NACDL brief on a different point entirely, appears to have nothing to do with the absence of an evidentiary hearing. In the alternative, Mirzayance recommends, in effect, that the federal court should pretend that the state court had the new facts before it when it ruled and should reconsider the reasonableness of the state-court ruling accordingly. RBM 36. As indicated in footnote 6 of the Warden's opening brief, neither of Mirzayance's proposals has merit.

A federal habeas judge's mere decision to conduct an evidentiary hearing and receive evidence of facts beyond the state-court record cannot so easily eliminate Congressionally-mandated deference to state-court judgments. Under § 2254(d), relief "shall not be granted" on any claim "adjudicated on the merits" by the state court. The only exceptions are where the ruling—at the time and on the basis of the record evidence presented to it—"was"

contrary to or involved an unreasonable application of "clearly established Federal law" or was based on an unreasonable determination of the facts. Neither exception has anything to do with federal evidentiary hearings, and neither exception applies in this case.

So, regardless of whether the new evidence in federal court is said to "merely buttress" the evidence offered in support of a claim already adjudicated on the merits in state court—as Mirzayance suggests here, RBM 34—the petitioner must always meet his burden to show that the state-court merits adjudication fails to meet the deferential-review standard of § 2254(d). See *Holland* v. *Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam). Evidence presented for the first time in federal habeas proceedings later may be considered by the federal court *after* the petitioner "exhausts" available state-court opportunities to fairly present the evidence and the claim to the state court. § 2254(b). If he has not forfeited merits review of his claim under state procedural law, the resultant state-court adjudication of that claim would then command § 2254(d) deference in later federal habeas proceedings.

Section 2254(d), that is, must be fully accounted for in cases where the state court adjudicated the petitioner's claim on the merits, regardless of whether a federal court chooses to hold a potentially-irrelevant evidentiary hearing on the petitioner's claim. Unless a petitioner makes out a statutory entitlement to a hearing under the special standards of § 2254(e)(1), in a case where the state-court doors are closed and where § 2254(d) is not triggered, the results of such a federal hearing at best may confirm the correctness of the state court ruling. But, where the state court has reasonably adjudicated the merits of the claim based on the state-court record, such hearings are unnecessary and wasteful. For they cannot trump

§ 2254(d)'s explicit rule precluding relief in such circumstances. Where relief is otherwise precluded, the district court should not hold an evidentiary hearing. See *Landrigan*, 127 S. Ct. at 1940.

Mirzayance's reliance on *Williams* v. *Taylor*, 529 U.S. 420 (2000), is misplaced. See RBM 35-36. Williams was not the recipient of a so-called "discretionary" grant of an evidentiary hearing on a claim already adjudicated by the state court. See, *e.g.*, *Landrigan*, 127 S. Ct. at 1944. He apparently never had a way to bring his newly-and diligently-discovered claim to the Virginia courts for a merits adjudication at all. *Williams*, 529 U.S. at 443; cf. *In re Gallegos*, 959 P.2d 290, 292-297 & n.8 (Cal. 1998); *In re Robbins*, 959 P.2d 311, 324-31 (Cal. 1998) (California habeas corpus courts remain open to consider second-petition claims when diligently discovered and presented). Williams thus satisfied the special evidentiary provision contained in § 2254(e)(1); at the same time, § 2254(d) was by its terms inapplicable because there had been no opportunity for a state-court adjudication of his claim in the first place.

Mirzayance is not like Williams. Mirzayance was never denied an opportunity to bring his evidence or claims to the California courts for adjudication on the merits. Indeed, he filed in the state courts the same affidavits and documents he later filed in the federal proceedings. The state courts, rather than requiring proof in an evidentiary hearing, provisionally assumed his allegations were true for the purpose of determining the legal question of whether the alleged facts made out a violation of his constitutional rights. The state courts' determination that Mirzayance's rights were not violated was an "adjudication on the merits" that must receive the full measure of deferential review that this Court has held to be required by § 2254(d). A federal evidentiary hearing producing "new" evidence is

extraneous to that dispositive question.

C. Mirzayance Relies On An Interpretation Of The Facts Belied By The Record And Rejected In The District Court's Well-Supported Findings.

Next, Mirzayance's brief argues—irrelevantly and unpersuasively—that the evidence from the federal evidentiary hearing, viewed in a light most favorable to him, shows that Wager rendered ineffective counsel under *Strickland*. RBM 25-26, 46-50, 57. Mirzayance, however, does not dispute that the record provided the district court with reasonable support for key factual findings that only confirm the correctness of the state-court result. Nor does Mirzayance suggest that the Ninth Circuit found any of the district court's factual findings to be assailable as "clearly erroneous" under Federal Rule of Civil Procedure 52(a). So—even if the Ninth Circuit somehow would have been entitled, despite § 2254(d), to grant habeas relief to Mirzayance based on a federal evidentiary hearing—it was still wrong to contradict the district court's findings of fact.

As explained by the dissenting judge, "[t]he factual questions involved in this inquiry were resolved against [Mirzayance]" following a "four-day evidentiary hearing." Pet. App. 14, 32.[5] Among other findings, the district court concluded: that trial counsel's "decision was carefully considered, not rashly made," with the concurrence of "experienced co-counsel"; and that, even if Mirzayance's parents might not have "*expressly refused* to testify," "they expressed a pronounced reluctance to do so, which amounted to the same thing." See Pet. App. 69-76. The

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5. Mirzayance overlooks that these rather non-controversial statements were made by the dissenting judge. Therefore, this was not, as Mirzayance alleges, an "inaccurate summary characterization" made by the Warden. See RBM 9.

district court's factual findings could only have compelled the denial of relief, but the Ninth Circuit ignored them in derogation of the "clear error" standard of review.

1. Rather than address the "clear error" issue raised in the certiorari petition, Mirzayance simply reargues his version the facts. For example, Mirzayance asserts that Wager's performance was deficient because it was based on his alleged "misapprehension" of the legal difference between the mental state for first-degree murder and the mental state for insanity under California law. See RBM 8, n.6, 9, 40-41, 51-54. But he makes that assertion without the benefit of any finding by either the district court or the Ninth Circuit.

In fact, the evidentiary hearing record does not support Mirzayance's claim that Wager misunderstood the law and that his misunderstanding caused him to recommend forgoing the NGI plea. Instead, the record shows a completely different set of events. First, the record supports the district court's findings that the jury's verdict—that the murder was "willful, premeditated, and deliberate"—signaled the failure of the defense's strategy of seeking a verdict no worse than *second*-degree murder and then securing an NGI verdict. Further, as the district court also reasonably found, Wager remained willing to proceed with a sanity phase *despite* the verdict of first-degree murder. See Pet. App. 69-70. Wager, however, believed that, in light of the jury's mental-state findings, any remaining chance of securing an NGI verdict depended on presenting some "emotional impact" testimony by Mirzayance's parents, "which Wager had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase." Pet. App. 42, 48, 51, 70-71. Wager, indeed, testified that the parents' "refusal to testify on behalf of their son"—not the verdict—was the ultimate "triggering event" that, in light of all the circumstances, led

to his decision to withdraw the NGI plea. EHT Vol. I at 70.

Contrary to Mirzayance's claim that counsel misunderstood the law, Wager concluded that the jury's first-degree murder verdict meant only that the NGI defense was unavailable "[u]nder the *facts* of this case"—not that it had become "legally" unavailable. See EHT Vol. I at 8 (italics added). In clarifying a previous answer, Wager explained:

> I didn't mean to leave that impression. The impression I meant to leave by that answer was that, once the jury had found that he had maturely and meaningfully deliberated and premeditated, they had unknowingly decided that he had—he knew the consequences of his actions and the nature and quality of his actions although they didn't know it. But in order to find, therefore, that he was insane, [they] would have to *in effect* disregard their earlier findings.

EHT Vol. I at 125 (italics added). Wager's assessment that the jury in effect had determined that Mirzayance could appreciate the "nature and quality of his actions" was, as the district court found, "reasonable." In his testimony, Wager logically explained how the NGI case was doomed after both the jury's finding of premeditation and deliberation *and* the parents' refusal to testify—not as a legally-prohibited verdict under California law, but as a practical matter "under the facts of this case." EHT Vol. I at 53-55, 60, 65, 88, 125, 137, 139-40.[6]

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6. Mirzayance also faults the Warden for describing Wager as "well versed in mental health and sanity issues," a characterization he claims is "not supported by Wager's testimony." RBM 10, n.8. But the Warden's characterization was supported by Mirzayance's family attorney James Lund, who vetted Wager and other "defense counsel candidates," before ultimately selecting Wager. In his declaration submitted to the state and federal courts, Lund described Wager's qualifications, which included:

2. Mirzayance also tries to minimize the fact, noted in the Warden's opening brief, that Dr. Anderson, one of the state court's appointed experts, had found Mirzayance was sane in that he "was capable of understanding the nature and quality of his actions and the rightness and wrongness of them—at time of present offense." See RBM 25-26; Ex. 25 at 4, 12-13; EHT Vol. III 10-11. Mirzayance contends that it is ambiguous whether Dr. Anderson was reporting Mirzayance's perspective at the time of the *interview* or at the time of the *homicide*. RBM 26, 47. But this is not the forum for second-guessing how the district court viewed the evidence. The district court reviewed Dr. Anderson's written report and observed his live testimony. They provided reasonable support for the district court's finding that:

> Dr. Anderson "reported putting a 'direct query' to [Mirzayance] as to whether he had felt 'it was right or wrong to stab or shoot the victim.' According to Dr. Anderson, [Mirzayance] responded that he felt 'that these actions were wrong at the time of the present offense.'"

> A) his 10 years experience with the Los Angeles County DA's Office, during which time he was the mentor and supervisor of now District Attorney Gil Garcetti; B) his role in the DA's office as the supervising expert on mental and insanity issues; C) his experience in having tried over 100 criminal cases before juries, thirty of which were as a private practitioner during the last ten years; D) his having tried over fifteen homicides to verdict before juries as a private practitioner; and E) his role as an officer and lecturer in various criminal law bar activities.

Ex. 9 at 1-2. Mirzayance has never disputed these described qualifications, and the lower courts could properly consider them when assessing whether Wager had made an "informed" decision. See Pet. App. 32.

Pet. App. 65. Because that finding cannot be deemed "clearly erroneous," it is binding on appeal.

In any event, a reasonable interpretation of the report is that Mirzayance in fact had admitted knowing at the time of the killing that his actions were wrong. A competent attorney, confronting that report in assessing whether the defendant could meet his burden of proof on the already long-odds insanity gambit, reasonably could conclude that it severely diminished the prospects of such a defense, if it did not foreclose it altogether.

3. In a similar vein, Mirzayance misses the point in arguing against the district court's finding that his parents' views about testifying amounted to a "refusal." RBM 56. Mirzayance does not dispute that the record nevertheless provided legally adequate support—to bind the appellate court—for the district court's conclusion that the parents' conduct amounted to the "same thing" as a refusal to testify and that Wager reasonably concluded that the parents' refusal was a "done deal" and "one that any beseeching on his part could not undo." Pet. App. 71-76. And Mirzayance—like the Ninth Circuit opinion—fails to discuss the most pertinent *Strickland* question of whether, in light of their expression of reluctance, a reasonable lawyer would have concluded that he could not rely on the parents to support an NGI defense. See *Strickland*, 466 U.S. at 690-91.

4. Finally, although he tries to ignore it, Mirzayance does not dispute that the district court found that Wager had made a "rational, carefully considered, and informed decision to forgo the insanity defense." Pet. App. 32. Nor does he dispute that these findings were supported by the record and thus could not be supplanted by the appellate court. Fed. R. Civ. P. 52(a); *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-74 (1985). Unable to defend the panel's disregard of those findings, Mirzayance tries to brush them

aside as "irrelevant to the *Strickland* issue." RBM 25, 49. But finding that Wager's decision was "rational, carefully considered, and informed" is patently "relevant" to whether he made a "reasonable choice." See *Roe*, 528 U.S. 479. And, as *Strickland* explains, informed decisions, i.e., those made after "thorough investigation of law and facts" are "virtually unchallengeable." *Id.* at 90-91. Moreover, the reasonableness of counsel's challenged conduct must be judged "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.*

Although the district court's evidentiary hearing was unwarranted in a § 2254(d) case where relief was precluded as a matter of law in light of the state-court record, see pp. 7-14, *ante*, its findings in any event confirm that Mirzayance's constitutional claim is meritless. The Ninth Circuit, having erred in failing to review the state courts' ruling with deference under § 2254(d), erred again when it overruled the district court's findings despite their validity under Federal Rule of Civil Procedure 52.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: October 31, 2008

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AMICUS CURIAE BRIEF

FILED
OCT 9 - 2008

No. 07-1315

IN THE
Supreme Court of the United States

Michael Knowles, Warden, California Department of Corrections and Rehabilitation,
Petitioner,

v.

Alexandre Mirzayance,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged by the parties with the Clerk of the Court pursuant to Rule 37.3.

all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; to promote the proper and fair administration of criminal justice; and to emphasize the continued recognition and adherence to the Bill of Rights that is necessary to sustain the quality of the American system of justice.

SUMMARY OF ARGUMENT

This Court has never applied 28 U.S.C. §2254(d) to a summary, unexplained state court decision. While the State's brief takes for granted that §2254(d) applies in such circumstances, and invites this Court to imagine the grounds upon which the state court might have based its decision and then "defer" to that reasoning, the approach the State proposes is at odds with the language and structure of §2254 and this Court's decisions applying it.

To establish entitlement to relief, a habeas petitioner must prove both that he "is in custody in violation of the Constitution," §2254(a), and that the state court decision rejecting his claim on the merits was "contrary to, or involved an unreasonable

application of, clearly established federal law," or "was based on an unreasonable determination of the facts ...," §2254(d). The §2254(a) inquiry involves traditional application of established constitutional rules to the evidentiary record. The §2254(d) inquiry, by contrast, looks to the state court's performance in adjudicating the petitioner's constitutional claim under binding federal law and in light of the available record. Giving effect to the presumption that state courts are competent adjudicators of federal rights, §2254(d) prohibits a federal court from remedying a constitutional violation merely because it disagrees with the outcome reached by the state court; instead, §2254(d) permits a remedy only where the federal court further concludes that the state court's adjudication of the claim was defective in one or more of the ways enumerated in §2254(d)(1) and (2).

Section 2254(d)'s concern with the state court's performance is evident from its sub-parts (1) and (2), which enumerate categories of errors that can be committed by a state court adjudicating a constitutional claim, and direct the federal habeas court to examine the applications of federal law that were "involved" in the state court decision, and the factual determinations that the state court decision "was based on." This Court's decisions illustrating the proper application of §2254(d) have consistently looked not only to the result reached by the state court, but to the reasoning articulated by the state court as it selected and applied the relevant law, and determined the relevant facts.

The analyses required by the language of §2254(d) and illustrated in this Court's decisions cannot be performed in the absence of some articulation of the state court's reasoning. Lower courts that have attempted to apply §2254(d) to unreasoned state court decisions have done so only through assumption and speculation, which are neither permissible under the plain statutory language or this Court's cases, nor likely to yield accurate, reliable results.

Application of §2254(d) to unexplained state court decisions also inevitably results in insulation of state court outcomes to which the statute, by its own plain language, is inapplicable. It is not unprecedented for a state court to overlook or misapprehend a prisoner's federal claim. Without some explanation of the state court's reasoning, however, a federal court cannot know whether the state court actually "adjudicated" a particular claim or its sub-parts "on the merits." Applying §2254(d) under these circumstances provides the individual state court with an unjustifiable windfall, and provides all state courts with a perverse incentive to say as little as possible when disposing of federal constitutional error. Neither of these results is consistent with the statutory scheme Congress enacted.

Section 2254(d) is best read such that its applicability depends not only on satisfaction of the express requirement that the state court "adjudicate[]" a federal claim "on the merits," but also the implicit requirement that the state court provide some

articulation of its rationale for denying relief. Moreover, under any reading of the statute, the impracticability of applying it to an unexplained state court decision must be accounted for. This can be accomplished with a sliding scale: where the state court provides a full or partial rationale, the limitation on relief is applicable to the extent the federal court can confidently conduct the inquiries mandated by §2254(d)(1) and (2); where the state court provides no rationale, a federal court which independently finds constitutional error under §2254(a) should be permitted to draw the natural conclusion that the state court's unexplained and erroneous denial of relief was tainted by one or more of the defects enumerated in §2254(d)(1) or (2). As a further alternative, a federal court convinced that a state court has summarily rejected a meritorious constitutional claim should be authorized to grant the writ if it concludes that the state court's unexplained result deviates substantially from the result dictated by the relevant law and the operative facts.

Finally, reading §2254(d) to apply only where the state court decision provides the federal habeas court with the information necessary to conduct the analyses dictated by the statute and illustrated in this Court's cases is consistent with states' interests in finality, comity and federalism. State courts that choose not to articulate their reasons for rejecting constitutional claims remain free to do so. And while §2254(d) is an important part of the habeas scheme, an array of other barriers to review and relief remain in place regardless of whether a state court's decision is

eligible for the additional protection made available through §2254(d).

ARGUMENT

NACDL concurs fully with the arguments set forth in the Brief of Respondent, and is of the view that Mirzayance's ineffective assistance of counsel claim should prevail. Trial counsel's last-minute decision to forego presentation of Mirzayance's insanity defense was objectively unreasonable given that the defense was fully prepared, viable, and represented Mirzayance's best hope for success at trial. Additionally, in light of the strength of the evidence counsel could have presented in support of the insanity defense, there is at least a reasonable probability that, but for counsel's unreasonable decision, the result of Mirzayance's trial would have been different.

NACDL submits this brief as *amicus* not to offer further discussion of the merits of Mirzayance's claim, but to alert the Court to a troubling subsidiary issue raised by the arguments in the Petitioner's Brief on the Merits ("Pet. Brf."). Whether or not resolution of this subsidiary issue ultimately proves necessary to the disposition of this case, *amicus* believes it is critical that the Court have a full appreciation for the scope and importance of the issue, either to properly resolve it in this case, or to ensure that it is appropriately reserved for a future case.

The ineffective assistance of counsel claim before the Court in this case was presented to the California

courts in state habeas corpus proceedings. The California Supreme Court, which was the last state court to rule on Mirzayance's claim, disposed of it summarily, and without the evidentiary hearing Mirzayance had requested, in an order stating as follows: "Petition for writ of habeas corpus DENIED." Pet. App. 206. The California Court of Appeal had earlier rejected Mirzayance's claim without explanation. Pet. App. 203 ("In a petition for writ of habeas corpus ... defendant additionally contends ... [he] was denied effective assistance of counsel. We ... deny the petition.").

This Court has never decided a case involving the combination of a summary state court disposition and 28 U.S.C. §2254(d). In its brief, the State proceeds on the assumption that §2254(d)'s limitation on the availability of federal habeas relief applies with full force to the California court's summary decision. Operating under this assumption, the State repeatedly invites the Court to (a) hypothesize grounds and rationales for the state court decision, and then (b) "defer" to this hypothetical state court decision in the name of §2254(d).[2] This Court, however, has never

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[2]*See, e.g.*, Pet. Brf. at 20-21 (asserting that California Supreme Court could have reasonably denied relief on either deficient performance or prejudice grounds); *id.* at 29 (quoting *Panetti v. Quarterman*, 127 S.Ct. 2842, 2858 (2007)) ("the dispositive inquiry under §2254(d) is whether a state-court decision can be 'reconciled with any reasonable application of the controlling standard' set forth in [sic] by this Court"); *id.* at 36 ("[I]t would not be unreasonable for a state court to conclude that Mirzayance had failed to establish either one or both of the two

endorsed such speculation-driven use of §2254(d). As discussed in the sections that follow, the combination of a summary state court decision and §2254(d) poses an array of serious problems[3] – problems of statutory construction, statutory application, and habeas policy – which the State's brief neither acknowledges nor attempts to resolve.[4]

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requisite prongs ... of a constitutional claim under *Strickland*"); *id.* at 37 ("Relief is unavailable under §2254(d)(1) because the state-court adjudication ... was at least 'reasonable' under *Strickland* in light of his unpersuasive showing of 'prejudice'"); *id.* at 39 ("[I]t would not be 'objectively unreasonable' to conclude under *Strickland* that Mirzayance had failed to establish a 'reasonable probability' that the jury would have found he could not appreciate the wrongfulness of his actions"); *id.* at 43 (state court record of trial counsel's investigative efforts "satisfies a proper competence inquiry under *Strickland*, and validates the 'reasonableness' of the state court adjudication"); *id.* at 44 (citing *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *Carey v. Musladin*, 127 S.Ct. 649, 654 (2006)) ("Even if the California Supreme Court's decision was somehow *incorrect*, it cannot fairly be labeled as 'objectively unreasonable' when viewed with the requisite 'double deference'").

[3]The difficulties raised by the prospect of applying §2254(d) to summary state court decisions have been recognized by the courts of appeals. *See, e.g., Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *Washington v. Schriver*, 255 F.3d 45, 53 (2nd Cir. 2001); *Hurtado v. Tucker*, 245 F.3d 7, 18 n.18 (1st Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 160 (4th Cir. 2000) (*en banc*).

[4]Although not the subject of this brief, significant problems can also arise when a federal court attempts to apply §2254(d) after holding an evidentiary hearing. As discussed *infra*, §2254(d) focuses on the state court's adjudication of a constitutional claim using the facts and law that were before the state court. This framework functions well when the factual record before the

I. THE POST-AEDPA FRAMEWORK FOR DETERMINING RIGHTS AND REMEDIES.

A post-AEDPA habeas petitioner seeking relief on a claim previously rejected by a state court for non-procedural reasons must ordinarily establish at least two things (though not necessarily in this order, *see Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)). Pursuant to 28 U.S.C. §2254(a), the petitioner must prove that he "is in custody in violation of the Constitution or laws or treaties of the United States." *See, e.g., Dickerson v. United States*, 530 U.S. 428, 439 n.3 (2000) ("Habeas corpus proceedings are available only

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federal court is the same as the record utilized by the state court. But when new facts are introduced in the federal proceeding, and those new facts significantly affect the analysis of the constitutional claim, §2254(d) loses its relevance. On one hand, the §2254(d) framework cannot accommodate a "claim" or "merits" materially different from those considered by the state court. *See* §2254(d)(2) (restricting analysis to "evidence presented in the state court proceeding"). And on the other hand, it would make no sense to preclude a federal court from giving full consideration to the new evidence as it resolves the petitioner's claim, particularly since that new evidence could have been accepted only after the petitioner had established both diligence in state court. *See* 28 U.S.C. §2254(e)(2); *(Michael) Williams v. Taylor*, 529 U.S. 420 (2000), and an entitlement to relief if his factual allegations were borne out, *see Schriro v. Landrigan*, 127 S.Ct. 1933 (2007). In short, where new evidence materially impacting the merits of a claim is accepted by a federal court, §2254(d) has no role to play with respect to the resolution of that claim. *See Holland v. Jackson*, 542 U.S. 649, 653 (2004) (*per curiam*) ("Where new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer").

for claims that a person 'is in custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. §2254(a)"). Absent proof that a constitutional right has been violated, there is no need to consider the availability of a remedy, for there has been no wrong for which a remedy could be required. *See Heck v. Humphrey*, 512 U.S. 477, 499 n.4 (1994) ("a state prisoner whose constitutional attacks on his confinement have been rejected by state courts cannot be said to be unlawfully confined unless a federal habeas court declares his 'custody [to be] in violation of the Constitution or laws or treaties of the United States,' 28 U.S.C. §2254(a)").

In addition to proof of a constitutional violation under §2254(a), a habeas petitioner must show that §2254(d)'s directive that "the writ of habeas corpus ... shall not be granted" does not prohibit a remedy for his claim. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005) ("We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§2254(a) and (d)"); *cf. Danforth v. Minnesota*, 128 S.Ct. 1029, 1047 (2008) (discussing distinction between recognition that a petitioner's constitutional right has been violated, and availability of the writ of habeas corpus as a remedy for that violation). A petitioner makes this showing by establishing that the state court's

> adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§2254(d).

It is well established that where both §2254(a) and §2254(d) apply, satisfaction of one but not the other is insufficient to permit relief. *See* (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("Under §2254(d)(1)'s 'unreasonable application' clause, ... a federal habeas court may not issue the writ *simply because* that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must *also* be unreasonable") (emphases added); *Fry v. Pliler*, 127 S.Ct. 2321, 2327 (2007) (§2254(d) "sets forth a precondition to the grant of habeas relief (...) not an entitlement to it").[5]

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[5]*See also, e.g., Rose v. Lee*, 252 F.3d 676, 691 (4th Cir. 2001) (satisfaction of §2254(d) without proof of constitutional violation under §2254(a) does not require relief); *Aleman v. Sternes*, 320 F.3d 687, 690-691 (7th Cir. 2003) (where prisoner can satisfy §2254(d), he "still must establish an entitlement to the relief he seeks, and it is §2254(a), not §2254(d), that sets the standard: the court issues 'a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States'"); *Frantz v. Hazey*, 533

Sections 2254(a) and 2254(d) ask different questions which must be answered in different ways. The question posed by §2254(a) goes directly to the allegation that a right guaranteed to the prisoner by the Constitution was violated during the prisoner's state court proceedings. Federal courts answer that question every day by reference to the constitutional rules of criminal law and procedure this Court has recognized, *e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing standard for resolving ineffective assistance of counsel claims); *Edwards v. Arizona*, 451 U.S. 477 (1981) (establishing rule for assessing claimed violations of right to counsel); *Brady v. Maryland*, 373 U.S. 83 (1963) (establishing due process rule requiring disclosure by prosecution of evidence favorable to the accused).[6]

Section 2254(d) asks a second, different question, one focused not on the existence *vel non* of a constitutional violation infecting the judgment underlying the prisoner's custody, but on the state court's performance in adjudicating the prisoner's challenge to that judgment based on the alleged constitutional violation. This focus on state courts' adherence to governing federal law and adjudicatory norms serves the dual purposes of ensuring that judgments reflecting the competence state courts are

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F.3d 724, 735-737 (9th Cir. 2008) (*en banc*) (recognizing and discussing independent roles for §§2254(a) and (d)).

[6]Where appropriate, the §2254(a) question also involves an assessment of whether the constitutional violation was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

presumed to possess are left alone,[7] while decisions produced by materially defective adjudications are not.

Proceeding from the presumption that state courts are generally competent adjudicators of federal rights whose judgments warrant respect, §2254(d) sets *denial* of a remedy as the default outcome in a federal habeas case ("An application for a writ of habeas corpus ... shall not be granted"). Recognizing that the presumption of state court competence does not always hold true, however, the statute further prescribes conditions under which the general prohibition against issuance of the writ can be set aside in a particular case (" shall not be granted ... unless ..."). Those conditions, set forth in subdivisions (d)(1) and (d)(2) of §2254, take the form of characteristics – analytical acts or omissions – which, when found in the "adjudication" which "resulted in" the state court's "decision," dispel the presumption that the state court competently resolved the prisoner's claim, thereby authorizing issuance of a federal remedy. Specifically, a state court decision denying relief will not be upheld against a federal court's finding of constitutional error where the adjudication that produced the state court decision: "was contrary to ... clearly established federal law," §2254(d)(1); or "involved an unreasonable application

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[7] *See, e.g.*, *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (criticizing court of appeals' "readiness to attribute error" to state court as "inconsistent with the presumption that state courts know and follow the law"); 142 Cong. Rec. S3447 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) ("There is simply no reason that federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts").

of[] clearly established federal law," §2254(d)(1); or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," §2254(d)(2).

That §2254(d) is concerned with the state court's performance in the process of adjudicating a constitutional claim is clear from its plain language. The three categories of characteristics enumerated in subparts (1) and (2) encompass the spectrum of analytical missteps and deviations from decision-making norms that a state court can commit when adjudicating a litigant's claim of constitutional error. Moreover, the second and third categories of characteristics ("involved an unreasonable application" and "was based on an unreasonable determination of the facts") both incorporate past participles ("involved" and "was based on") which explicitly direct the federal habeas court to look not merely at the state court outcome, but at the subsidiary findings and reasoning which yielded that outcome. Thus, where a federal court is convinced that constitutional error within the meaning of §2254(a) is present, these two features of §§2254(d)(1) and (2) combine to require a careful examination of whether the state court's failure to itself recognize and remedy the error is attributable to a departure from governing law or decision-making norms, or instead to a competent determination that no error exists with which the federal court simply disagrees.

This Court's decisions illustrate the analyses that must be undertaken for each of the three

categories enumerated by §§2254(d)(1) and (2). In *Williams*, the Court held that §2254(d)(1)'s "was contrary to" clause is satisfied where "the state court applies a rule that contradicts the governing law set forth in our cases," or where "the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams*, 529 U.S. at 405-406. In applying this construction, the Court has consistently looked to the content of the state court's decision for an express statement of the rule chosen by that court, or for other indicators from which to confidently infer that the state court's rule of decision was consistent with the governing federal principles. In *Williams* itself, the Court looked to "[t]he Virginia Supreme Court's own analysis of prejudice" and found it "contrary to" *Strickland* because it "mischaracterized at best the appropriate rule," such that the resulting "decision turned on [the state court's] erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." *Williams*, 529 U.S. at 397. After a similar examination of the content of the state court's decision in *Woodford v. Visciotti*, *supra*, the Court rejected the Ninth Circuit's determination that the state court's decision "was contrary to" federal law because that determination rested upon a "mischaracterization of the state court opinion, which expressed and applied the proper standard for evaluating prejudice." *Visciotti*, 537 U.S. at 22.

Section 2254(d)(1)'s "involved an unreasonable

application of" clause has been construed to authorize habeas relief where "the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," and where "the state court either unreasonably extends a legal principle ... to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. Here again, this Court has consistently looked to and relied upon the content of the state court's opinion for signs that the court did or did not reasonably apply the governing rule. For example, in *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*), the Ninth Circuit's grant of relief on a jury coercion claim was overturned because, although the state court's opinion did not cite federal law, its reasoning indicated that the state court had applied principles at least as favorable to the petitioner as those prescribed by federal law, and the "fair import of the [state] Court of Appeal's opinion" was that it had considered all of the relevant facts. *Early*, 537 U.S. at 8-9; *see also id.* ("Avoiding the[] pitfalls [of §2254(d)(1)] does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the *reasoning nor the result* of the state-court decision contradicts them") (second emphasis added). Similarly, in *Williams*, this Court's determination that the Virginia Supreme Court "failed to evaluate the totality of the available mitigation evidence" rested on the content of the state court's opinion. *Williams*, 529 U.S. at 397; *accord, e.g., Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (Maryland Court of Appeals' decision involved an unreasonable application of *Strickland*

because its reasoning showed it had "merely assumed that [trial counsel's] investigation was adequate"); *Rompilla v. Beard*, 545 U.S. 374, 388-89 (2005) (Pennsylvania state post-conviction courts' superficial review of trial counsel's investigation "fail[ed] to answer the considerations" relevant to the *Strickland* deficient performance inquiry, and was therefore "objectively unreasonable"); *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654, 1671 (2007) (state court's "formulation of the issue" and inattention to "the fundamental principles established by [this Court's] most relevant precedents, resulted in a decision that was both 'contrary to' and 'involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'").

Additionally, although this Court has had only one occasion to describe its application in a case, the approach to §2254(d)(2)'s "was based on an unreasonable determination of the facts" clause is the same. In *Wiggins*, the state court's opinion revealed that its rationale for denying relief included a mistaken belief that certain records available to trial counsel contained information from which counsel could have made an informed decision to limit their investigation. After recognizing that the records did not contain the information attributed to them by the state court, this Court concluded under §2254(d)(2) that the state court's "partial reliance on an erroneous factual finding further highlights the unreasonableness of [its] decision." *Wiggins*, 539 U.S. at 528.

While this Court's decisions applying §2254(d) have involved a variety of underlying constitutional claims, and have resulted in both grants and denials of relief, they all share a common characteristic: the §2254(d) analyses have always been informed in substantial part by the content of the state court decision rejecting the prisoner's claim during an earlier stage of review. As discussed below, without the information that can only be obtained from a reasoned state court decision, the approach to §2254(d) illustrated by this Court's cases cannot work.

II. PROBLEMS INHERENT IN THE APPLICATION OF §2254(d) TO A SUMMARY STATE COURT DECISION.

The inquiries necessitated by the plain language of the statute cannot be made when a federal court has only a summary state court denial with which to work. As the decisions discussed above illustrate, a federal court applying §2254(d)(1) or (2) must be able to answer an array of questions for itself. For example, to apply §2254(d)(1)'s "was contrary to" clause, a federal court must be able to ascertain the rule or legal principle selected and relied upon by the state court. A federal court applying §2254(d)(1)'s "involved an unreasonable application of" clause must know, *e.g.*, whether the state court understood the scope of the governing rule, what factors the state court considered in applying the rule, and what evidence the state court considered relevant to application of the rule. And a state court answering §2254(d)(2)'s "was based on an unreasonable determination of the facts" question

must know, *e.g.*, what evidence the state court did and did not acknowledge or credit, what inferences the state court drew or failed to draw from the evidence, and the relative weight assigned to particular items or classes of evidence. All of these questions arise naturally and directly from the plain meaning of §2254(d)(1) and (2)'s three key phrases. None can be meaningfully answered by reference to a summary state court decision.

Some courts of appeals have purported to apply §2254(d) to summary state court decisions, but the analyses they have performed do not comport with the requirements of the statute. For example, some courts of appeals have held that, when confronted with a summary state court decision, the federal habeas court should assume the state court selected the correct clearly established federal law from this Court's decisions, and then determine whether the result reached by the state court was reasonable. *See, e.g.*, *Reid v. True*, 349 F.3d 788, 799 (4th Cir. 2003); *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003). This approach has at least two serious problems.

First, there is no justification – in the statute or elsewhere – for assuming away the portion of §2254(d)(1)'s "was contrary to" clause that requires a federal court to determine whether "the state court applie[d] a rule that contradicts the governing law set forth in [this Court's] cases." *Williams*, 529 U.S. at 405-06. To be sure, Congress did set denial of relief as the default outcome in §2254(d), but it paired that default outcome not with the sort of blind deference

that assuming the accuracy of the state court's choice of law necessarily entails, but with a carefully calibrated mechanism by which a prisoner may prove that the state court outcome in his case resulted from a defective adjudication and may therefore be disturbed.

Second, any assessment of the reasonableness of an unexplained state court decision necessarily relies on a form of reverse-engineering that is inconsistent with the plain language of the statute and this Court's decisions applying it. *See, e.g., Wade v. Herbert*, 391 F.3d 135, 142 (2nd Cir. 2004) ("Because the [state court] gave no explanation beyond saying that the claim was 'without merit,' we cannot know the exact basis of its reasoning. If any reasonable ground was available, we must assume the court relied on it"); *Bell v. Jarvis*, 236 F.3d 149, 168-171 (4th Cir. 2000) (*en banc*) (assuming state court reached and resolved each component of petitioner's Sixth Amendment claim and crediting state court's rejection of claim as reasonable). A court applying §2254(d)(1) must be able to assess the application of federal law or equivalent principles that was actually "involved" in the state court's adjudication. A rationale for denying relief imagined by the federal court or counsel for the state is not an adequate substitute. Indeed, when confronted in *Wiggins* with the state's proffer of a *post hoc* rationale for the state court of appeals' decision, this Court dismissed it as having "no bearing" on the §2254(d) analysis. *Wiggins*, 539 U.S. at 529. The same holds true when a court applies §2254(d)(2). It is impossible for a federal court to know or assess the

reasonableness of the factual determinations that a state court's denial of relief "was based on" without some reliable evidence of what those determinations were. If the Maryland Court of Appeals had not issued a reasoned decision in *Wiggins*, this Court would never have known that the state "court based its conclusion, in part, on a clear factual error" satisfying §2254(d)(2). *Wiggins*, 539 U.S. at 528. The defect in the state court's decision would still have existed, but it would have gone undetected.

The assumptions necessary to the application of §2254(d) to an unexplained state court decision also ensure that the statute will be applied to claims or components of claims as to which its plain language actually renders it inapplicable. On its face, §2254(d) applies only to a "claim that was adjudicated on the merits in State court proceedings." It is far from unprecedented for a state court to misunderstand or overlook a prisoner's federal claim. When this occurs in a non-summary state court decision, federal courts have no trouble recognizing that there has been no adjudication of the federal claim by the state court, and that §2254(d) therefore does not apply. *See, e.g.*, *Sperry v. McKune*, 445 F.3d 1268, 1274-75 (10th Cir. 2006); *Harrison v. McBride*, 428 F.3d 652, 666 (7th Cir. 2005); *Chadwick v. Janecka*, 312 F.3d 597, 606 (3rd Cir. 2002); *Gruning v. DiPaolo*, 311 F.3d 69, 71 (1st Cir. 2002). When this occurs in a summary state court decision, however, application of §2254(d) results in a windfall of protection to which the state court decision, by the statute's plain terms, is not entitled.

Moreover, even if it could be assumed that the state court reached every federal claim presented by the prisoner, it could not further be assumed that the state court reached every *component* of every claim, as would be necessary to justify application of §2254(d). For example, *Strickland*, 466 U.S. at 697, expressly instructs that "there is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one." When a state court limits its analysis as permitted by *Strickland* but fails to explain that it has done so, the federal habeas court cannot safely rely upon an assumption that the state court reached both prongs of the *Strickland* test. Given *Strickland*'s instruction, such an assumption would often be wrong, and a federal court applying §2254(d) on the basis of the assumption would be doing so in circumstances where this Court has twice expressly found its application inappropriate.[8] *See Wiggins*, 539 U.S. at 534 ("our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis"); *Rompilla*, 545 U.S. at 390 ("Because the state courts found the representation adequate, they never reached

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[8]The danger of over-application of §2254(d) to test components not reached by state courts is by no means confined to ineffective assistance of counsel claims governed by *Strickland*. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231 (2005) (discussing and applying three-part analysis for resolving equal protection claim under *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (describing three essential components of *Brady v. Maryland* violation).

the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo*") (internal citation omitted).

In addition to being impractical and unfaithful to the language of the statute, sanctioning application of §2254(d) to unexplained decisions would establish a perverse incentive structure for state courts. On one hand, a state court conscientious enough to analyze a prisoner's federal claims and articulate the bases for its decision subjects its reasoning and conclusions to the scrutiny of a federal court making the inquiries prescribed by §2254(d). On the other hand, a state court which merely declares that a prisoner's claims – no matter how numerous, complex or debatable – are "denied" or "without merit" gets the benefit of every doubt, from whether the court even understood and reached each claim and its components, to whether the court chose the appropriate rule of decision, to whether the court reasonably applied that rule to facts reasonably found from the state court record. Such an incentive structure would at once undermine the legislative premise upon which passage of §2254(d) was made possible, *see supra* at 12 n.7, and increase the number of federal habeas cases resolved through rank speculation rather than accurate analysis.

III. RECONCILING THE NEED FOR A REASONED STATE COURT DECISION WITH §2254(d)'S "ADJUDICATED ON THE MERITS" CLAUSE.

At first blush, §2254(d)'s opening lines suggest that the only prerequisite to application of the statute's

limitation on granting habeas relief is a determination that the "claim ... was adjudicated on the merits in State court proceedings." If this were the only requirement, then an unexplained state court decision would, technically, come within §2254(d)'s reach. *See, e.g., Sellan v. Kuhlman*, 261 F.3d 303 (2nd Cir. 2001) ("'[a]djudicated on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with *res judicata* effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground"); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000) ("In the context of federal habeas proceedings, a resolution (or adjudication) on the merits is a term of art that refers to whether a court's disposition of the case was substantive, as opposed to procedural").

Such a narrow, technical reading of the statute's opening lines, however, creates tension with the plain language of subparts (d)(1) and (d)(2) – particularly the mandate that a federal court assess the applications of federal law "involved" in a state court decision, and the determinations of fact the state court decision "was based on." As shown *supra*, whether such inquiries are *actually* appropriate in a given case, and if so, exactly how those inquiries should proceed, cannot be determined without some explanation of the bases for the state court's decision. This tension is avoided by recognizing that §2254(d) contains *both* an explicit requirement that a state court adjudicate a claim on the merits (as opposed to a procedural ground), and an implicit requirement that the state court decision disclose its reasoning. To the extent either of these

requirements goes unmet by the state court's decision, §2254(d) should be deemed inapplicable.

Even if §2254(d) is not read to contain an implicit requirement that state courts explain their work, the impracticability of conducting the analyses required by §§2254(d)(1) and (2) on summary state court decisions must be acknowledged and accounted for. The accommodation most reconcilable with the statute would take the form of a sliding scale. Where the state court decision is partially or fully reasoned, a federal court would be obligated to credit the state court's rationales – those that appear expressly and those that can be reasonably inferred – when performing the §2254(d) analysis, just as this Court's decisions have illustrated. But where the state court decision is unreasoned, the federal court would first be obligated to independently assess the merits of the constitutional question under §2254(a). If that independent assessment reveals a constitutional violation, the federal court would not be obliged to assume that the state court's result, though decidedly wrong, was nevertheless produced by an analysis that was consistent with or involved a reasonable application of clearly established federal law, and was based on a reasonable determination of the facts. Instead, the federal court would be permitted to draw the more natural and intuitive conclusion that a state court decision which reaches an incorrect result on an issue of federal constitutional law and does not even undertake to justify that result by articulating reasoning which attempts to come to terms with the governing law and operative facts is tainted by at least

one of the defects enumerated in §2254(d)(1) and (2). The combination of constitutional error found under §2254(a) and adjudicatory defect inferred under §2254(d) would authorize issuance of the writ.

As a further alternative, the statute's basic requirement that a petitioner show both a constitutional violation and a defect in the state court's decision could be construed to require that, where a state court's unexplained result deviates from the result the federal court finds should flow from the application of clearly established federal law to the record facts, the magnitude of the deviation must be *substantial* before issuance of a remedy would be authorized under §2254(d). This alternative would represent at least a rough accommodation of the statutory aims to heighten respect for state court adjudications of the merits of constitutional issues, but to do so only where it is clear that the state court actually undertook such an adjudication in a manner consistent with the law and the facts.

IV. LIMITING APPLICATION OF §2254(d) TO STATE COURT DECISIONS ACTUALLY SUSCEPTIBLE TO MEANINGFUL REVIEW WOULD NOT UNDERMINE STATES' INTERESTS FINALITY, COMITY AND FEDERALISM.

Reading §2254(d) in the manner described above does not offend the comity and federalism interests underlying AEDPA or place any undue burden on state courts. For the vast majority of state courts, the effort necessary to produce a reasoned decision is a small

price to pay for the benefits promised by §2254(d). State courts willing to trade those benefits for the freedom not to explain their decisions on matters of federal constitutional law, of course, remain free to do so. *Cf.* (*Michael*) *Williams v. Taylor*, 529 US. 420, 443 (2000) ("We do not suggest the State has an obligation to pay for investigation of as yet undeveloped claims; but if the prisoner has made a reasonable effort to discover the claims ..., §2254(e)(2) will not bar him from developing them in federal court").

Furthermore, although §2254(d) is an important part of the post-AEDPA federal habeas scheme, it is not the sole mechanism for safeguarding states' interests in finality, comity and federalism. On the contrary, even where a state court chooses not to describe the reasoning underlying its decision on a federal constitutional claim, a prisoner seeking federal habeas relief still faces a demanding set of requirements. For example, prisoners remain obligated in all cases to fairly present their constitutional claims to the state courts, *see* 28 U.S.C. §2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), and to make diligent efforts to develop the facts in support of those claims before the state courts, *see* 28 U.S.C. §2254(e)(2); (*Michael*) *Williams v. Taylor*, *supra*. States' interests in the enforcement of their own rules continue to be protected by the procedural default doctrine. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977). States' interests in finality likewise continue to be safeguarded by the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288, 301 (1989). *See also Horn v.*

Banks, 536 U.S. 266, 272 (2002) (*per curiam*) ("in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state"). Additionally, for many constitutional violations, relief remains unavailable absent a finding that the "error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Fry v. Pliler*, 127 S.Ct. at 2327 ("[I]t is implausible that, without saying so, AEDPA replaced the *Brecht* standard of 'actual prejudice,' with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable. That said, it certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former") (additional internal citations omitted).

In short, a determination that §2254(d) should not be applied where doing so is impracticable would remove only one of a formidable array of barriers to habeas relief. The barriers that remain would provide ample protection to the minority of state courts that choose to reject claims of federal constitutional error without disclosing their reasons for doing so.

CONCLUSION

WHEREFORE, for the foregoing reasons, *amicus curiae* National Association of Criminal Defense Lawyers supports Mirzayance's request that the grant of habeas relief be affirmed, and urges the Court to resolve this case in a manner consistent with prerequisites to application of 28 U.S.C. §2254(d) described in this brief.

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PETITION FOR RE-HEARING

Supreme Court, U.S.
FILED
APR 14 2009
OFFICE OF THE CLERK

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No. 07-1315

In the Supreme Court of the United States

Michael Knowles, Warden, California Department of Corrections and Rehabilitation,
Petitioner,

v.

Alexandre Mirzayance,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.1, respondent respectfully petitions this Court for rehearing.

I. Introduction

The conclusion reached in the March 24, 2009 Opinion is deficient in failing to acknowledge or address a primary factual finding by the Magistrate Judge supporting the credibility of the insanity defense; in misapprehending basic distinctions between the definitions of first degree murder and insanity under California law; in propounding an extraneous "nothing to lose"rule that played no part in the Circuit panel decision; and in misstating the punishment alternatives for which respondent was eligible.

While this case never presented a cert. worthy issue, and does not purport to promulgate any new rule of law or clarification of existing law, the Opinion rests on erroneous factual and legal premises and is bound to confuse and mislead the bench and bar. For this reason, respondent requests that the Court grant rehearing and dismiss the petition as improvidently granted.

II. The Opinion Does Not Acknowledge or Address the Magistrate Judge's Factual Determination that the Evidence Supporting Respondent's Insanity Defense was Sufficiently Credible to Meet the Strickland Standard of Prejudice.

The Opinion is rife with pejorative characterizations of the lack of strength of the

evidence of insanity that was available for presentation at the time defense counsel abandoned it. See, e.g., pp. 6, 16 (weak), 11, 12 (no chance to succeed), 14 (certain to lose), 15 (dismal prospects). Those negative characterizations had their origins in defense counsel's self-serving testimony at the federal evidentiary hearing, and were avidly adopted by the State in its briefing. Respondent has argued throughout that the most objective and reasonable evaluation of the strength of the evidence was that of the Magistrate Judge. The latter actually heard the testimony of psychiatrists who had been prepared to testify at the insanity phase, reviewed the declarations of additional mental health experts, and based on his firsthand assessment of the strength of the insanity defense, concluded: "[a]s witnesses could have testified credibly and therefore perhaps successfully - even though subject to potential strong cross-examination - prejudice is established, as the Court's confidence in the verdict therefore is undermined." Pet. App. [PA] 100.

Nowhere in this Court's opinion is there any reference to that firsthand assessment of the viability of the insanity defense. The Magistrate Judge understood very well that his assigned task was to assess the potential merits of the insanity defense even without the testimony of respondent's parents, and he concluded that the strength was sufficient to undermine confidence in the outcome, i.e., to meet the general Strickland standard of prejudice. The Opinion fails to acknowledge the Magistrate Judge's objective assessment and instead adopts trial counsel's subjective assessment

as if it were reasonable, to conclude that "counsel...is not required to have a tactical reason - above and beyond the reasonable appraisal of a claim's dismal prospects for success - for recommending that a weak claim be dropped altogether." Slip Op'n, p. 15.

There is a stark disparity between this Court's characterization of the prospects for the insanity defense as "dismal" versus the Magistrate Judge's characterization of it as "credibl[e] and therefore perhaps successful[]." Considering that the Magistrate Judge actually heard the experts testify and directly evaluated their direct testimony and cross-examination, his assessment should have been given prominent attention if not the express deference that is required under Fed. Rule Civ. Proc. 52(a) and, e.g., Anderson v. Bessemer City, 470 U.S. 564, 573-4 (1985).

While the Opinion chastises the panel majority because it "failed even to mention the clearly-erroneous standard, let alone apply it, before effectively overturning the lower court's factual findings related to counsel's behavior" (Op'n, p. 14), the Opinion does not grapple with the Magistrate Judge's finding of fact which contradicts the Opinion's characterization of the strength of the NGI defense. A credible defense is neither weak nor one with dismal prospects.

Rehearing is necessary because the Opinion similarly fails to mention the Magistrate Judge's finding in this regard, does not defer to it, and effectively overturns it with respect to the strength

of the insanity defense. If the Opinion had adopted the Magistrate Judge's assessment of the insanity defense as credible, the Opinion could not have reached the adverse conclusion that it did.

Fundamental fairness and fidelity to the principles of even-handed appellate review require rehearing for that assessment to be addressed and adjudicated.

III. The Opinion's Misunderstanding of the Basic Distinctions Between the Definitions of First Degree Murder and Insanity Under California Law.

Rehearing is equally necessary because a large portion of the Opinion is premised on a manifest misunderstanding of California law; i.e., a mistaken belief that the definitions of first degree murder and legal insanity are so similar that a finding of first degree murder based on premeditation and deliberation is tantamount to a finding of legal sanity. This misunderstanding manifests itself at the outset of the Opinion, which claims that the defense "presented medical testimony[1] that he was insane at the time of the crime and was, therefore, incapable of the premeditation or deliberation

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[1] As to the "medical testimony" presented at the guilt phase, Dr. Satz was not a medical doctor, but an academic psychologist. The three very experienced psychiatrists ready to testify for Mirzayance at the sanity phase were, of course, medical doctors, as was Dr. Anderson, who testified at the evidentiary hearing favorably for Mirzayance on the NGI issue.

necessary for a first degree murder conviction." Opn., p. 2 (emphasis supplied). That inaccurate articulation of the guilt phase presentation fails to recognize that the California legislature had long since abolished the "diminished capacity" defense, Penal Code § 28, and that the only issue was whether respondent in fact formed the mental states of premeditation and deliberation entirely independent of whether he was sane.

Contrary to the view implicit in the Opinion, a California defendant may well be able to prove that he is completely crazy under the California definition of legal insanity, but nonetheless find himself correctly convicted of first-degree murder, because the two legal concepts are not similar, much less proxies for each other. A typical example occurs where a defendant commits a homicide under a belief that a benign higher power directs him to kill someone perceived to be an instrument of a diabolical force. When the defendant follows the direction of the higher power and plans and executes the killing, the defendant is clearly guilty of first degree murder just as he is not guilty by reason of insanity.

Moreover, the erroneous premise of the Opinion is clearly evidenced in this record because (1) defense counsel attempted to elicit from Dr. Satz an opinion as to respondent's sanity during the guilt trial, and was precluded from doing so because it was irrelevant to the guilt determination (RT 510-511, 513); and (2) defense counsel attempted to argue to the jury that respondent's irrationality brought on by mental illness made him not guilty of

first-degree murder, but the district attorney objected and obtained a further jury instruction that proof of irrationality from mental disease (i.e., insanity) did not in any way negate proof of premeditation and deliberation. The trial court correctly informed the jury that premeditation and deliberation were not dependent on the motivation for the homicidal act and that the proof of premeditation and deliberation is not "lacking when the considerations reflected on by the defendant were the product of mental disease or defect." RT 853.

This mistaken conflation of first degree murder and insanity is repeated in the Opinion's characterization of the defense burden of proof at the insanity phase -- "he [respondent] would have borne the burden of proving his insanity" and "[c]ounsel had planned to meet that burden by presenting medical testimony similar to that presented in the guilt phase, including evidence that Mirzayance was insane and incapable of premeditating or deliberating." Op'n at 2 (emphasis supplied). To the contrary, a California defendant has the burden at an insanity trial to prove only that he did not know right from wrong at the time of the homicide, regardless of how clearly he premeditated and deliberated the killing. Thus, even if a defendant were permitted to present overwhelming proof at the sanity trial that he did not premeditate or deliberate, that evidence would not aid him in meeting his burden of proof of insanity.

The erroneous conflation of premeditation/

deliberation with legal insanity results in the Opinion's incorrect assessment that the first degree murder verdict was tantamount to res judicata as to respondent's sanity, making the insanity defense a losing proposition regardless of the strength of the evidence.[2] However, California law has always been clear that proof of first degree murder is not in any way a proxy for a finding of legal sanity. Proof of insanity "does not negative an element of the offense." People v. Hernandez, 22 Cal. 4th 512, 522; 93 Cal. Rptr. 2d 509 (2000). A murder verdict does negate an element of insanity. "A finding of such mental state [for the crime itself] does not foreclose a finding of insanity." Id., at 520. See People v. Ferris, 130 Cal. App. 4th 773, 780; 30 Cal. Rptr. 3d 426 (2005) ("insanity is not an element of a criminal offense"). Defendants convicted of first degree murder may be found insane and vice versa. See,

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[2] This misunderstanding is further manifested in the Opinion's description of the evidence that would have been presented at the insanity trial. The Opn. states that the NGI evidence would have "essentially ... duplicated" that produced in the guilt phase. Opn. p. 3. It would not only have been different in addressing a completely different mental state issue, but would have been substantially more forceful given that four experienced psychiatrists (and, in addition, the State's expert, Dr. Anderson) would have testified that Mirzayance's psychotic condition, his paranoia, and his irrational belief in self-justification at the time of the homicide satisfied the absence-of knowledge-of-wrongfulness prong of the California NGI test. Nothing like that was presented at the guilt phase. As noted supra, no opinion on the mental state for murder was permitted at the guilt phase.

e.g., People v. Villarreal, 167 Cal. App. 3d 450, 455 213 Cal. Rptr. 179 (1985) ("appellant asks us to hold that an insane person, as a matter of law, cannot commit first-degree murder. We decline to do so").

Thus, rehearing is necessary because the premise in the Opinion that the mens rea of first degree murder and the definition of legal sanity are functionally equivalent reflects a misunderstanding of California law.

IV. The Erroneous Attribution to the Panel Majority of a "Nothing to Lose" Standard.

The Circuit did not employ either a "nothing to lose" rule or a "nothing to gain" rule as the Opinion incorrectly posits. See Opn., p. 9 fn. 3 (stating a "nothing to gain" strategy is the equivalent of "nothing to lose.") The clearest demonstration that the "nothing to lose/nothing to gain" characterizations did not play any part in the panel majority decision is that the Ninth Circuit had long since expressly disavowed any such rule in Lowery v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994);[3]

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[3] Lowry's Strickland deficient performance argument was based on the notion "that `a defendant has "everything to gain and nothing to lose"' in filing a motion to suppress.' See United States v. Molina, 934 F.2d 1440, 1447 (9th Cir. 1991). That proposition suggests that a lawyer should file a suppression motion in every case, because the defendant has nothing to lose and the lawyer can never be certain that the judge will not suppress the evidence against his client. We have rejected that argument where the motion

(continued...)

U.S. v. Molina, 934 F.2d 1440, 1447 (9th Cir. 1991)("while it is arguably true, as Molina contends, that a defendant has 'everything to gain and nothing to lose' in filing a motion to suppress, it is not professionally unreasonable to decide not to file a motion so clearly lacking in merit.") The Circuit did not employ such a rule in this case.

The Opn., however, finds the "nothing to lose" rule was employed by the Circuit despite the latter's explicit use of the "objective unreasonable" performance standard in Strickland v. Washington, 466 U.S. 668 (1984). PA 5, 8,10, 12. Because the "overarching duty of counsel to advocate the client's cause" in an effort "to make the adversarial testing process work in the particular case" (id., at 466 U.S. 690), the Circuit majority finding of deficiency under Strickland was supported by the record.

Rehearing is necessary to purge the Opinion of the numerous references to "nothing to lose/nothing to gain," in favor of objective Strickland analysis of whether the insanity defense was viable, as the Magistrate Judge and the panel majority found, in which case it was unreasonably deficient performance to abandon it for no benefit to respondent.

The Opn. states the general proposition that

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[3](...continued)
would be without merit. Id. We do so again now. A lawyer's zeal on behalf of his client does not require him to file a motion which he knows to be meritless on the facts and the law."

"[s]trategic choices after investigation are virtually unchallengeable." Opn., p. 12. However, that proposition applies where either the investigation yielded (1) no credible evidence supporting a defense; or (2) credible evidence supporting a different defense that counsel did present. The proposition does not apply where, as here, the investigation yielded viable evidence supporting only the insanity defense.

Defense counsel's abandonment of the insanity defense because of personal and subjective doubts about its chances of success are virtually indistinguishable from abandonment of a defense based on extra-legal consideration such as astrology or lottery. If defense counsel had awakened on the morning of trial with several expert witnesses prepared to testify in support of a long-planned insanity defense, read his horoscope in the local newspaper, and abandoned the insanity defense under that influence, no court would defer to that as a reasonable tactical decision under Strickland. Here, defense counsel's abandonment due to his subjective doubts is entitled to no more deference:

> Q. Was there anything Alex [respondent] gained by waiving the N.G.I. trial?
> A. [Counsel] No. ER1 123.

V. The Fundamental Misunderstanding of the California Sentencing Structure for First Degree Murder.

The Opinion asserts that "Mirzayance has no complaints about the sentencing phase since he

received the lowest possible sentence for his first degree murder conviction." Op'n, p. 14, fn. 4; emphasis added. The Opinion states Mirzayance did not receive either the death penalty or life without possibility of parole, as if those more serious sentences were possibly applicable to him in this case. This is another fundamental misunderstanding manifest in the Opinion, which further skews its conclusion. In fact, the only two outcomes applicable to Mirzayance under the facts of this case (and as reflected in the prosecutor's charging decision) were (1) the worst case scenario, i.e.,what he received, 25 years to life plus a weapon use enhancement; or (2) the best case scenario, i.e., commitment to a mental hospital until he recovered his sanity. Mirzayance received the only prescribed possible sentence for the charged first degree murder. The case was never charged as a special circumstances case to make Mirzayance eligible for either death or life without parole. See Calif. Penal Code § 190.2, requiring a charge of a special circumstance to make one eligible for death or life without parole. Mirzayance received the maximum possible sentence for his murder conviction (25 years to life), not the lowest sentence as the Opn. erroneously states.[4]

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[4] The Opn.'s conclusion that Mirzayance escaped a more draconian punishment impliedly through defense counsel's efforts is thus manifestly erroneous. Indeed, at oral argument, counsel for both sides stated that the mandatory sentence for the murder conviction was 25 to life plus the gun use enhancement. See Oral Argument Tr. 42, 53-53 ("set by statute.")

Mirzayance's defense always focused on his sentence. Had defense counsel pursued his viable and credible NGI defense, Mirzayance could have, as counsel admitted at the hearing, had the opportunity to "proceed to a mental health facility for treatment," and possible release upon recovery long before he could possibly be released on parole from the life sentence. EH1 123, 124.

Conclusion

Respondent Mirzayance urges that rehearing be granted because the Opinion is predicated on fundamental errors of fact and law. However, even if those fundamental errors are corrected, there is no cert. worthy issue to occupy this Court's docket. At oral argument, members of the Court posed questions that suggested there was a pending cert. worthy issue relating to the standards for holding an evidentiary hearing, but that issue was not raised by the State in its petition as an issue for review nor decided by this Court. For these reasons, dismissal of the petition best promotes the interests of the law and justice.

April 14, 2009

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CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay. /s/ Charles M. Sevilla